

Compendium of House and Senate report language and the
final enacted legislation relative to 10 USC 2320 and 10 USC
2321 and related legislation

1984-2015

Calendar No. 944

98TH CONGRESS
2d Session

SENATE

REPORT
98-500

OMNIBUS DEFENSE AUTHORIZATION ACT, 1985

R E P O R T

[To accompany S. 2723]

ON

AUTHORIZING APPROPRIATIONS FOR FISCAL YEAR 1985 FOR THE ARMED FORCES FOR PROCUREMENT, FOR RESEARCH, DEVELOPMENT, TEST, AND EVALUATION, AND FOR OPERATION AND MAINTENANCE, TO PRESCRIBE PERSONNEL STRENGTHS FOR SUCH FISCAL YEAR FOR THE ARMED FORCES AND FOR CIVILIAN EMPLOYEES OF THE DEPARTMENT OF DEFENSE, TO AUTHORIZE APPROPRIATIONS FOR SUCH FISCAL YEAR FOR CIVIL DEFENSE, TO AUTHORIZE CERTAIN CONSTRUCTION AT MILITARY INSTALLATIONS FOR SUCH FISCAL YEAR, TO AUTHORIZE APPROPRIATIONS FOR THE DEPARTMENT OF ENERGY FOR NATIONAL SECURITY PROGRAMS FOR SUCH FISCAL YEAR, AND FOR OTHER PURPOSES

together with

ADDITIONAL VIEWS

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE



MAY 31, 1984.—Ordered to be printed

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WASHINGTON : 1984

34-685 O

TECHNICAL DATA TO BE SPECIFIED IN PROPOSALS

In addition to requiring that statements regarding intent to deliver technical data free from encumbrances be included as factors in deciding contract award, the committee believes it is equally important that the head of an agency issue regulations requiring all offers to include a statement on the extent of data and rights in data to be delivered to the United States with purchase. This information so furnished will then become one factor in deciding contract award.

The committee does not intend that only competitive contracts include provisions regarding technical data. Even if the original system is procured on a non-competitive basis, it is imperative that procurement personnel begin planning for competitive procurement of spare parts at the time of initial contract.

SPECIFICATION OF TECHNICAL DATA TO BE PURCHASED IN CONTRACTS

The committee has concluded that the most credible evidence of prior planning for the treatment of technical data will be evidenced by contractual provisions explicitly detailing the treatment of technical data, regardless of whether such data is purchased for the purpose of eventual competitive procurement or for some other reason. For this reason the statute requires that the contract specify the data to be purchased, establish criteria for acceptability of the data, establish a separate payment line for the data, and define the respective rights of the government and the contractor in the data.

The committee has also provided the authority to the government to withhold progress payments to contractors who have not complied with their contractual commitments regarding technical data.

Whenever a contractor or subcontractor asserts a limitation over any data, that party should be prepared to defend such assertion in writing to the contracting officer within 60 days. The committee does however recognize that there may be occasions when the contractor was not able to properly identify an item as proprietary at the time of contract. When such omission was inadvertent the committee does provide for later protection of such claim by the Department.

This section also includes provisions to require the development and implementation of systems to better manage technical data in the covered agencies.

VALIDATING PROPRIETARY DATA RESTRICTIONS

This section establishes the process by which the contractor and the government may reach an agreement regarding proprietary data restrictions that have been challenged. In particular when the government challenges a proprietary restriction that is found to be not substantially justified, then the government's cost of such challenge shall be reimbursed by the contractor. The committee does not intend that in every case where a challenge is successful the government's cost should be reimbursed. The language is provided as a deterrent against parties who would force the Government to

formally challenge designations that are substantially without merit.

SEC. 199A, COMPUTER MANAGEMENT OF SPARE PARTS

This section would require that the Department submit to the Congress within 180 days a plan for upgrading its computer capability so as to increase its management tools to deal with spare parts issues.

SEC. 199B, PROCUREMENT TECHNICAL ASSISTANCE

This section provides for cooperative agreements to be made between the Department of Defense and state and local governments and nonprofit organizations that provide technical assistance to firms that seek to bid for defense procurements. Such existing technical assistance centers have increased competition for defense contracts and subcontracts, including spare parts, and to ensure the capability of businesses to perform defense contracts. Under this section, the Department of Defense will enter into cost-sharing, cooperative agreements with existing procurement technical assistance centers and with new centers that will be formed as a result of these agreements. These agreements will be entered into on a competitive basis, in which state and local governments and other recipients will submit applications to the Secretary of Defense. Such applications will include a description of the geographic area to be served, assurances that the applicant will furnish a matching amount of funds to carry out the agreement, assurances that the applicant will not pay more than 10 percent of the monies for private consultant services, and such other information as the Secretary may require. In the case of existing centers, applicants will be required to submit additional information relating to program experience.

To insure that the benefits of this program are nationwide in scope, there should be no less than one such cooperative agreement in each Defense contract administration services region. Additionally, each procurement center should be located sufficiently close to an appropriate Defense contract administration services region office to receive necessary staff training and other appropriate assistance.

SEC. 199C, REVISIONS OF REQUIREMENTS FOR SELECTION ACQUISITION REPORTS AND UNIT COST REPORTS

This section would amend sections 139a and 139b of title 10 of the United States Code. Section 139a deals with the Selected Acquisition Report (SAR) system and section 139b deals with the Unit Cost Report system.

The amendments to existing law, most of which are technical in nature, would make the following changes:

1. establishes a minimum dollar threshold of \$2,000,000 on major contracts for which SAR reporting is required;
2. requires quarterly SARs only when there is a 5 percent or greater change in total program cost, or when there is a 3 month or greater delay in any of the baseline SAR milestones;

F485
Conference

98TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
98-1080

DEPARTMENT OF DEFENSE AUTHORIZATION
ACT, 1985

THE COMMITTEE OF CONFERENCE

SUBMITTED THE FOLLOWING

CONFERENCE REPORT

[To accompany H.R. 5167]

the
5167)



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"(6) The requirements of subsection (b) also apply before enforcement of any qualified products list, qualified manufacturers list, or qualified bidders list.

"(d)(1) If the number of qualified sources or qualified products available to compete actively for an anticipated future requirement is fewer than two actual manufacturers or the products of two actual manufacturers, respectively, the head of the agency concerned shall—

"(A) periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification unless the contracting officer determines that such publication would compromise national security; and

"(B) bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement, but such costs may be borne only if the head of the agency determines that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to amortize the costs incurred by the agency within a reasonable period of time considering the duration and dollar value of anticipated future requirements.

"(2) The head of an agency shall require a prospective contractor requesting the United States to bear testing and evaluation costs under paragraph (1)(B) to certify as to its status as a small business concern under section 3 of the Small Business Act.

"(e) Within seven years after the establishment of a qualification requirement under subsection (b) or within seven years following an agency's enforcement of a qualified products list, qualified manufacturers list or qualified bidders list, any such qualification requirement shall be examined and revalidated in accordance with the requirements of subsection (b). The preceding sentence does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2).

"(f) Except in an emergency as determined by the head of the agency, whenever the head of the agency determines not to enforce a qualification requirement for a solicitation, the agency may not thereafter enforce that qualification requirement unless the agency complies with the requirements of subsection (b).

"§ 2320. Rights in technical data

"(a) The legitimate proprietary interest of the United States and of a contractor in technical or other data shall be defined in regulations prescribed as part of the single system of Government-wide procurement regulations as defined in section 4(4) of the Office of Federal Procurement Policy Act. Such regulations may not impair any right of the United States or of any contractor with respect to patents or copyrights or any other right in technical data otherwise established by law. The following factors shall be considered in prescribing such regulations:

"(1) Whether the technical data was developed—

"(A) exclusively with Federal funds;

"(B) exclusively at private expense; or

"(C) in part with Federal funds and in part at private expense.

"(2) The statement of congressional policy and objectives in section 200 of title 35, the statement of purposes in section 2(b) of the Small Business Innovation Development Act of 1982 (Public Law 97-219; 15 U.S.C. 638 note), and the declaration of policy in section 2 of the Small Business Act (15 U.S.C. 631).

"(3) The interest of the United States in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture.

"(4) The policy set forth in section 1202(6) of the Defense Spare Parts Procurement Reform Act.

"(b) Regulations prescribed under paragraph (1) shall require that, whenever practicable, a contract for supplies or services entered into by an agency named in section 2303 of this title contain appropriate provisions relating to technical data, including provisions—

"(1) defining the respective rights of the United States and the contractor or subcontractor (at any tier) regarding any technical data to be delivered under the contract;

"(2) specifying the technical data, if any, to be delivered under the contract and delivery schedules for such delivery;

"(3) establishing or referencing procedures for determining the acceptability of technical data to be delivered under the contract;

"(4) establishing separate contract line items for the technical data, if any, to be delivered under the contract;

"(5) to the maximum practicable extent, identifying, in advance of delivery, technical data which is to be delivered with restrictions on the right of the United States to use such data;

"(6) requiring the contractor to revise any technical data delivered under the contract to reflect engineering design changes made during the performance of the contract and affecting the form, fit, and function of the items specified in the contract and to deliver such revised technical data to an agency within a time specified in the contract;

"(7) requiring the contractor to furnish written assurance at the time the technical data is delivered or is made available that the technical data is complete and accurate and satisfies the requirements of the contract concerning technical data;

"(8) establishing remedies to be available to the United States when technical data required to be delivered or made available under the contract is found to be incomplete or inadequate or to not satisfy the requirements of the contract concerning technical data; and

"(9) authorizing the head of the agency to withhold payments under the contract (or exercise such other remedies as the head of the agency considers appropriate) during any period if the contractor does not meet the requirements of the contract pertaining to the delivery of technical data.

"(c) Nothing in this section or in section 2305(d) of this title prohibits the Secretary of Defense from prescribing standards for determining whether a contract entered into by the Department of Defense shall provide for a time to be specified in the contract after which the United States shall have the right to use (or have used) for any purpose of the United States all technical data required to be delivered to the United States under the contract or providing for such a period of time (not to exceed 7 years) as a negotiation objective.

"(d) The Secretary of Defense shall by regulation establish programs which provide domestic business concerns an opportunity to purchase or borrow replenishment parts from the United States for the purpose of design replication or modification, to be used by such concerns in the submission of subsequent offers to sell the same or like parts to the United States. Nothing in this paragraph limits the authority of the head of an agency to impose restrictions on such a program related to national security considerations, inventory needs of the United States, the improbability of future purchases of the same or like parts, or any additional restriction otherwise required by law.

"§ 2321. Validation of proprietary data restrictions

"(a) A contract for supplies or services entered into by the Department of Defense which provides for the delivery of technical data, shall provide that—

"(1) a contractor or subcontractor at any tier shall be prepared to furnish to the contracting officer a written justification for any restriction asserted by the contractor or subcontractor on the right of the United States to use such technical data; and

"(2) the contracting officer may review the validity of any restriction asserted by the contractor or by a subcontractor under the contract on the right of the United States to use technical data furnished to the United States under the contract if the contracting officer determines that reasonable grounds exist to question the current validity of the asserted restriction and that the continued adherence to the asserted restriction by the United States would make it impracticable to procure the item competitively at a later time.

"(b) If after such review the contracting officer determines that a challenge to the asserted restriction is warranted, the contracting officer shall provide written notice to the contractor or subcontractor asserting the restriction. Such notice shall state—

"(1) the grounds for challenging the asserted restriction; and

"(2) the requirement for a response within 60 days justifying the current validity of the asserted restriction.

"(c) If a contractor or subcontractor asserting a restriction subject to this section submits to the contracting officer a written request, showing the need for additional time to comply with the requirement to justify the current validity of the asserted restriction, additional time to adequately permit the submission of such justification shall be provided by the contracting officer as appropriate. If a party asserting a restriction receives notices of challenges to restrictions on technical data from more than one contracting officer, and

notifies each contracting officer of the existence of more than one challenge, the contracting officer initiating the first in time challenge, after consultation with the party asserting the restriction and the other contracting officers, shall formulate a schedule of responses to each of the challenges that will afford the party asserting the restriction with an equitable opportunity to respond to each such challenge.

"(d)(1) Upon a failure by the contractor or subcontractor to submit any response under subsection (b), the contracting officer shall issue a decision pertaining to the validity of the asserted restriction.

"(2) If after review of any justification submitted in response to the notice provided pursuant to subsection (b), the contracting officer determines that the justification for the restriction on the right of the United States to use technical data does not support adequately the asserted restriction on the technical data, a contracting officer shall within 60 days of receipt of any justification submitted, issue a decision or notify the party asserting the restriction of the time within which a decision will be issued.

"(e) If a claim pertaining to the validity of the asserted restriction is submitted in writing to a contracting officer by a contractor or subcontractor at any tier, such claim shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.).

"(f)(1) If, upon final disposition, the contracting officer's challenge to the restriction on the right of the United States to use such technical data is sustained—

"(A) the restriction on the right of the United States to use the technical data shall be cancelled; and

"(B) if the asserted restriction is found not to be substantially justified, the contractor or subcontractor, as appropriate, shall be liable to the United States for payment of the cost to the United States of reviewing the asserted restriction and the fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the United States in challenging the asserted restriction, unless special circumstances would make such payment unjust.

"(2) If, upon final disposition, the contracting officer's challenge to the restriction on the right of the United States to use such technical data is not sustained—

"(A) the United States shall continue to be bound by the restriction; and

"(B) the United States shall be liable for payment to the party asserting the restriction for fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the party asserting the restriction in defending the asserted restriction if the challenge by the United States is found not to be made in good faith.

"§ 2322. Limitation on small business set-asides

"(a) The head of an agency may not authorize a procurement to be set-aside for participation only by small business concerns in the case of a procurement under the Foreign Military Sales program, if the foreign purchaser specifies the sources qualified to meet the requirement and only one of those sources is a small business concern.

bidders' lists, and to any qualification requirement established after the effective date of this provision.

The House amendment would also preclude the Department of Defense from denying an offeror the opportunity to submit and have its bid considered solely because the potential offeror was not on a qualified bidders' list, qualified manufacturers' list or qualified products list, if the potential offeror can demonstrate before the date of contract award that it meets the prescribed standards. This provision specifically states that it does not require referral to the Small Business Administration of an agency's decision that an offeror has not met the qualification requirement.

For all qualification requirements other than qualified bidders' lists, qualified manufacturers' lists and qualified products lists, the amendment would authorize the head of the purchasing office to waive the requirement that the agency specify in writing all requirements that must be satisfied by a potential offeror for a renewable two-year period if the head of the purchasing office, after review by the appropriate competition advocate, determines that it is unreasonable, because of cost, inability to acquire, or other circumstances, to specify the standards for qualification that a prospective offeror or its product must satisfy.

Rights in technical data.—The House bill contained two provisions (secs. 808, 812) addressing the issue of rights in technical data. One provision stated the situations in which the government would acquire unlimited rights in technical data, required the contractor to warrant that the data it provided was complete and accurate, would provide that the government may ignore, correct or cancel any improper restriction on the release of data if the contractor failed to satisfactorily substantiate the propriety of the restriction, and would require the Secretary of Defense to prescribe regulations for determining whether a defense contract would contain a time limit (not to exceed seven years) on a contractor's right to limit the government's use of technical data.

An additional provision in the House bill would require the Secretary of Defense to prescribe by regulation what constitutes the legitimate proprietary interest of a contractor in technical data. In prescribing such regulations, the Secretary of Defense would be directed to give consideration to the statement and objectives of numerous statutes relating to Small Business where appropriate, on the placement of a time limit on the right of a company to limit release of technical data developed at private expense, or in whole or in part with Federal funds, requiring a contractor to include in development and production contracts provisions pertaining to technical data, and directing the department to establish programs to provide domestic concerns an opportunity to purchase or borrow parts for design replication.

The Senate amendment contained similar provisions except with respect to the delineation of the situations in which the government acquired unlimited rights in technical data and the proscription of a time limit on the contractor's ability to restrict use of technical data.

The House recedes with an amendment.

The conferees acknowledge that legislation which would accommodate in every case of the government's interest in being able to

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use contractors' technical data to allow other potential competitors to produce the item as well as a contractor's right to protect data relating to items or processes it developed at its own expense, is virtually impossible. The conferees believe that the direction to the Department of Defense provided in the conference amendment to prescribe regulations defining the legitimate interests of the United States and of a contractor to be implemented in the system of government-wide procurement regulations will afford the best opportunity to reach a fair and reasonable balance of these competing interests. The amendment further requires that the regulations take into consideration the policies with respect to technical data enunciated by the Congress in this and other legislation. The latter provision was intended to ensure that legislative policies otherwise enunciated are not disregarded when implementing the policies of this act.

The House amendment broadens the scope of the Senate provision which would require contracts to contain appropriate provisions relating to technical data so that the provision now applies to all items, not just major systems. The Senate provision authorizing the Secretary of Defense to establish in a solicitation or as a negotiation objective a date after which the government will acquire the right to use technical data, was amended to authorize the Secretary to establish a set period of time (not to exceed seven years) as a negotiation objective.

Validation of proprietary data restrictions.—The House bill contained a provision (sec. 808(b)) that would require a contract for the acquisition of supplies (that includes a requirement for technical data) to require the contractor to possess an approved data management system before the United States accepts any data to be delivered under the contract. It would also permit the United States to ignore, cancel or correct any restriction on the release of technical data if the contractor fails to substantiate the restriction within 60 days of a request to do so. The contractor would also be required to pay the government's costs in challenging such a restriction if the contractor's asserted restriction was not substantially justified, but the government could not assert any right to challenge such restrictions beyond the three-year period after final payment under the contract.

The Senate amendment contained a similar provision (sec. 199(a)).

The House recedes with an amendment specifying a procedure for both the United States and a contractor or subcontractor at any tier to equitably resolve challenges to asserted restrictions on the government's right to use technical data. The amendment would also provide for an extension of the 60-day time period for submitting information justifying the asserted restriction if good cause is shown and require the United States to pay the costs incurred by a party defending such restriction if the challenge by the government of the contractor's asserted restriction on technical data was not in good faith.

Commercial pricing for supplies.—The House bill contained a provision (sec. 812) that would preclude the Department of Defense from entering into a contract using other than competitive procedures for the purchase of spare or replacement parts having a com-

NATIONAL DEFENSE AUTHORIZATION ACT
FOR FISCAL YEAR 1987

R E P O R T

OF THE

COMMITTEE ON ARMED SERVICES
U.S. HOUSE OF REPRESENTATIVES

ON

H.R. 4428

together with

ADDITIONAL AND DISSENTING VIEWS

[Including cost estimate of the Congressional Budget Office]



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as it has been in 1981. The committee agreed to an increase in the threshold in Public Law 98-525 based on statements by the Defense Department that, although the certification would be required for contracts between \$100,000 and \$500,000, the Defense Department would not routinely require pre-award audits before awarding contracts between that amount. The committee is concerned that audits prior to award are being routinely requested, even when not necessary to ensure the reasonableness of the contractor's price. The committee believes this contributes to the lengthening of the acquisition lead time and recommends a reevaluation of the guidance provided Defense Department personnel on use of pre-award audits. Furthermore, the Defense Department is directed to report to the committee on the impact and cost effectiveness of making contracts between \$100,000 to \$500,000 subject to this Act.

SECTION 913—RIGHTS IN TECHNICAL DATA

Sections 2320 and 2321, Title 10, United States Code, added as part of the Defense Procurement Reform Act, Title XII of the fiscal year 1985 Defense Authorization Act (Public Law 98-525), establish the parameters for Department of Defense regulations on the right to use technical data provided the government by its contractors. The committee is concerned that the Department of Defense, in its regulations and in certain acquisitions, has upset the delicate balancing of interests between the government's need to acquire the right to release technical data to ensure competition and the contractor's interest in preserving valuable property rights in data on products that they develop at their own expense. The committee is also aware of the continuing need for the Department of Defense to maintain its access to advanced technologies developed at private expense.

Although Congress has mandated increased competition in the Defense Department's acquisition of goods and services, the committee believes many alternatives exist to achieve that goal, and do so more effectively, without coercing contractors and subcontractors into relinquishing legitimate rights in technical data. For example, greater use of licensing arrangements, agreements to require a contractor to maintain and update technical data, and the government's use of data to evaluate the acceptability of a potential offeror's product could result in a much fairer accommodation of the interests of all parties.

The committee is also concerned that the proposed Defense Department regulations published by the Department of Defense for public comment September 10, 1985 defines the term "developed" in an excessively stringent manner by requiring an "actual reduction to practice"—a term of art used to establish eligibility for a patent. The Committee believes that, for purposes of determining whether an item has been developed at private expense, an item or process should generally be considered "developed" if the item or process exists and reasonable persons skilled in the applicable art would conclude that the item will work as intended with a high probability. The committee recognizes that circumstances may exist under which such a definition would not be appropriate, for instance, in the area of basic research.

Due to the need to craft a definition that may be different, depending on the type of data involved, and the divergent views of experts on this subject, as well as the absence of hearings on this specific issue, the committee believes that to define the term legislatively would be inappropriate. Instead, the committee has directed the Secretary of Defense to craft the specific limitations of the term. For similar reasons the committee has directed the Secretary to determine through regulations what constitutes "private expense."

In addition, the committee believes that challenges to restrictions on the release of data should be made promptly and only when a restriction is believed to be inappropriate. To expect a contractor to maintain indefinitely detailed accounting records that would be necessary to prove that a contractor paid for development of an item is unreasonable.

Section 913 would amend section 2320 of title 10 to clarify that, if the item to which the technical data relates was developed at private expense, the contractor retains the unlimited rights in data and cannot be required, as a condition of bidding on a government contract, to give the government the right to release to other contractors technical data relating to items the contractor developed at its own expense. For those items developed at government expense, the government has unlimited rights in the technical data. With respect to items developed with a mixture of government and contractor money, the committee believes that the government's rights to use, release or disclose technical data must be established in the contract for delivery of the item to which the data relates or as soon thereafter as practicable. The determination of such rights should be based on consideration of pertinent factors such as the government's need to retain the right to use, release or disclose the data in order to compete future requirements, and the contractor's interest in retaining rights in data relating to innovative products or processes, including those related to items for sale to the general public.

Section 913 relates to ascertainment of the rights to use, release or disclose data and is not intended as direction to the Defense Department on the issue of whether technical data must be delivered. For example, there are many circumstances exist in which the government does not need to acquire technical data. Nor is this section intended to preclude the government and its contractors from agreeing to alter the rights accorded either party under this section. For example, the government may agree to give a contractor a license to use data developed at government expense provided the government retains the right to use, release, or disclose the data for government purposes, including competitive acquisition; or the government may negotiate for the right to use, release or disclose data developed at private expense.

Section 913 would also amend section 2321(a)(2) of title 10: (1) to prohibit the government from challenging a contractor's restriction on the release of technical data at any time after the three-year period after final payment under the contract or delivery of the data, whichever is later; (2) to require the government to state the specific grounds for challenging an asserted restriction; and (3) to allow the contractor to assert in response to a challenge that the

Defense Department has reviewed the same data within the last three years and found the contractor's restriction appropriate.

SECTION 914—PRICES FOR PRODUCTS SOLD COMMERCIALY

A provision of the Defense Procurement Improvement Act (Public Law 99-145) which requires the government to purchase at the lowest commercial price, has resulted in significant problems for companies desiring to provide commercial products to the government. Industry has objected to the standards utilized by the Department of Defense in establishing the contractors' commercial price. In addition, contractors are seriously concerned about maintaining the confidentiality of data relating to the pricing of products sold in the commercial market.

After consideration of these objections and review of the policy behind adoption of the provision, the committee recommends a provision (sec. 914) that would specifically exclude the following considerations when determining the company's lowest commercial price: (1) sales to the Federal government; (2) intracompany sales or transfers; (3) sales to dealers, distributors, or original equipment manufacturers, unless the government can demonstrate that the sale is under the same terms and conditions as a sale to a dealer, distributor or original equipment manufacturer; (4) sales to foreign purchasers; and (5) sales to educational institutions for educational purposes. This change would ensure that the government is offered a product at a price equal to or better than the company's lowest "market determined" price.

The provision would also clarify that the data underlying the prices of products sold commercially are not subject to disclosure under the audit rights available to government agencies. Such pricing data is highly sensitive and includes financial information that the government does not need in order to enforce the law.

Finally, the committee wishes to clarify that this section is not intended to be applied to contracts or orders under the multiple award schedule programs administered by the General Services Administration and the Veterans Administration. In this regard the committee recognizes the unique nature and the special procurement procedures utilized in establishing the multiple award schedule.

SECTION 915—FUNDING OF PROCUREMENT TECHNICAL ASSISTANCE PROGRAMS SERVING DISTRESSED AREAS

In the fiscal year 1986 Department of Defense authorization act (Public Law 99-145) Congress authorized the Department of Defense to pay up to 75 percent of a procurement technical assistance center's costs if the center was in a distressed area and was sponsored by a local government. The committee believes that any center which serves a distressed area should be entitled to the higher funding amount.

The committee recommends that the Department of Defense be authorized to pay up to 75 percent of the cost of running an outreach center sponsored by any state, local government or private, nonprofit organization, if the center serves an area with an unemployment rate one percent higher than the national average.

99TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
99-1001

**NATIONAL DEFENSE AUTHORIZATION ACT
FOR FISCAL YEAR 1987**

CONFERENCE REPORT

TO ACCOMPANY

S. 2638



OCTOBER 14, 1986.—Ordered to be printed

"(ii) at the current rate prescribed by the Secretary of the Treasury under section 6621 of the Internal Revenue Code of 1954; and

"(B) if the submission of such defective data was a knowing submission, for an additional amount equal to the amount of the overpayment.

"(2) Except as provided under subsection (d), the liability of a contractor under this subsection shall not be affected by the contractor's refusal to submit a certification under subsection (a)(2) with respect to the cost or pricing data involved.

"(f) **RIGHT OF UNITED STATES TO EXAMINE CONTRACTOR RECORDS.**—(1) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this section with respect to a contract or subcontract, the head of the agency, acting through any authorized representative of the head of the agency who is an employee of the United States or a member of the armed forces, shall have the right to examine all records of the contractor or subcontractor related to—

"(A) the proposal for the contract or subcontract;

"(B) the discussions conducted on the proposal;

"(C) pricing of the contract or subcontract; or

"(D) performance of the contract or subcontract.

"(2) The right of the head of an agency under paragraph (1) shall expire three years after final payment under the contract or subcontract.

"(3) In this subsection, the term 'records' includes books, documents, and other data.

"(g) **COST OR PRICING DATA DEFINED.**—In this section, the term 'cost or pricing data' means all information that is verifiable and that, as of the date of agreement on the price of a contract (or the price of a contract modification), a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived."

(b) **CONFORMING AMENDMENTS.**—(1) Subsection (f) of section 2306 of such title is amended to read as follows:

"(f) So-called 'truth-in-negotiations' provisions relating to cost or pricing data to be submitted by certain contractors and subcontractors are provided in section 2306a of this title."

(2) Section 934(a) of the Defense Procurement Improvement Act of 1985 (title IX of Public Law 99-145; 99 Stat. 700) is repealed.

(c) **CLERICAL AMENDMENTS.**—(1) The heading of section 2306 of title 10, United States Code, is amended to read as follows:

"§2306. Kinds of contracts".

(2) The table of sections at the beginning of chapter 137 of such title is amended by striking out the item relating to section 2306 and inserting in lieu thereof the following:

"2306. Kinds of contracts.

"2306a. Cost or pricing data: truth in negotiations."

(d) **EFFECTIVE DATES.**—(1) Except as provided in paragraph (2), section 2306a of title 10, United States Code (as added by subsection

(a)), and the amendment and repeal made by subsection (b), shall apply with respect to contracts or modifications on contracts entered into after the end of the 120-day period beginning on the date of the enactment of this Act.

(2) Subsection (e) of such section shall apply with respect to contracts or modifications on contracts entered into after November 7, 1985.

SEC. 953. RIGHTS IN TECHNICAL DATA

(a) **RIGHTS IN TECHNICAL DATA.**—Subsection (a) of section 2320 of title 10, United States Code, is amended to read as follows:

“(a)(1) The Secretary of Defense shall prescribe regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to an item or process. Such regulations shall be included in regulations of the Department of Defense prescribed as part of the Federal Acquisition Regulation. Such regulations may not impair any right of the United States or of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law.

“(2) Such regulations shall include the following provisions:

“(A) In the case of an item or process that is developed by a contractor or subcontractor exclusively with Federal funds, the United States shall have the unlimited right to—

“(i) use technical data pertaining to the item or process;

or

“(ii) release or disclose the technical data to persons outside the government or permit the use of the technical data by such persons.

“(B) Except as provided in subparagraphs (C) and (D), in the case of an item or process that is developed by a contractor or subcontractor exclusively at private expense, the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the government or permit the use of the technical data by such persons.

“(C) Subparagraph (B) does not apply to technical data that—

“(i) constitutes a correction or change to data furnished by the United States;

“(ii) relates to form, fit, or function;

“(iii) is necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data); or

“(iv) is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restriction on further release or disclosure.

“(D) Notwithstanding subparagraph (B), the United States may release or disclose technical data to persons outside the Government, or permit the use of technical data by such persons, if—

“(i) such release, disclosure, or use—

“(I) is necessary for emergency repair and overhaul;

or

"(II) is a release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the United States and is required for evaluational or informational purposes;

"(ii) such release, disclosure, or use is made subject to a prohibition that the person to whom the data is released or disclosed may not further release, disclose, or use such data; and

"(iii) the contractor or subcontractor asserting the restriction is notified of such release, disclosure, or use.

"(E) In the case of an item or process that is developed in part with Federal funds and in part at private expense, the respective rights of the United States and of the contractor or subcontractor in technical data pertaining to such item or process shall be agreed upon as early in the acquisition process as practicable (preferably during contract negotiations), based upon consideration of all of the following factors:

"(i) The statement of congressional policy and objectives in section 200 of title 35, the statement of purposes in section 2(b) of the Small Business Innovation Development Act of 1982 (15 U.S.C. 638 note), and the declaration of policy in section 2 of the Small Business Act (15 U.S.C. 631).

"(ii) The interest of the United States in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture.

"(iii) The interest of the United States in encouraging contractors to develop at private expense items for use by the Government.

"(F) A contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract, to sell or otherwise relinquish to the United States any rights in technical data except—

"(i) rights in technical data described in subparagraph (C); or

"(ii) under the conditions described in subparagraph (D).

"(G) The Secretary of Defense may—

"(i) negotiate and enter into a contract with a contractor or subcontractor for the acquisition of rights in technical data pertaining to an item or process developed by such contractor or subcontractor exclusively at private expense if necessary to develop alternative sources of supply and manufacture; or

"(ii) agree to restrict rights of the United States in technical data pertaining to an item or process developed entirely or in part with Federal funds if the United States receives a royalty-free license to use, release, or disclose the data for purposes of the United States (including purposes of competitive procurement).

"(3) The Secretary of Defense shall define the terms 'developed' and 'private expense' in regulations prescribed under paragraph (1).

"(4) For purposes of this subsection, the term 'Federal Acquisition Regulation' means the single system of Government-wide procure-

ment regulations as defined in section 4(4) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4))."

(b) **VALIDATION OF PROPRIETARY DATA RESTRICTIONS.**—Subsections (a) and (b) of section 2321 of title 10, United States Code, are amended to read as follows:

"(a) A contract for supplies or services entered into by the Department of Defense which provides for the delivery of technical data shall provide that a contractor or subcontractor at any tier shall be prepared to furnish to the contracting officer a written justification for any restriction asserted by the contractor or subcontractor on the right of the United States to use such technical data.

"(b)(1) The Secretary of Defense shall ensure that there is a thorough review of the appropriateness of any restriction on the right of the United States to release or disclose technical data delivered under a contract to persons outside the Government, or to permit the use of such technical data by such persons. Such review shall be conducted before the end of the three-year period beginning on the date on which final payment is made on a contract under which technical data is required to be delivered, or the date on which the technical data is delivered under such contract, whichever is later.

"(2)(A) If the Secretary determines, at any time before the end of the three-year period beginning on the date on which final payment is made on a contract under which technical data is required to be delivered, or the date on which the technical data is delivered under such contract, whichever is later, that a challenge to a restriction is warranted, the Secretary shall provide written notice to the contractor or subcontractor asserting the restriction. Such a determination shall be based on a finding by the Secretary that reasonable grounds exist to question the current validity of the asserted restriction and that the continued adherence to the asserted restriction by the United States would make it impracticable to procure the item competitively at a later time. Such notice shall—

"(i) state the specific grounds for challenging the asserted restriction;

"(ii) require a response within 60 days justifying the current validity of the asserted restriction; and

"(iii) state that evidence of a validation by the Department of Defense of a restriction identical to the asserted restriction within the three-year period preceding the challenge shall serve as justification for the asserted restriction if—

"(I) the validation occurred after a review of the validated restriction under this subsection; and

"(II) the validated restriction was asserted by the same contractor or subcontractor (or any licensee of such contractor or subcontractor) to which such notice is being provided.

"(B) Notwithstanding subparagraph (A), the United States may challenge a restriction on the release, disclosure, or use of technical data delivered under a contract at any time if such technical data—

"(i) is publicly available;

"(ii) has been furnished to the United States without restriction; or

"(iii) has been otherwise made available without restriction."

(c) **CONFORMING AMENDMENTS.**—Section 1202 of the Department of Defense Authorization Act, 1985 (10 U.S.C. 2301 note), is amended—

- (1) by inserting “and” at the end of paragraph (4);
- (2) by striking out “; and” at the end of paragraph (5) and inserting in lieu thereof a period; and
- (3) by striking out paragraph (6).

(d) **DEADLINE FOR REVISION OF REGULATIONS.**—(1) Proposed regulations under section 2320(a)(1) of title 10, United States Code (as amended by subsection (a)), shall be published in the Federal Register for comment not later than 90 days after the date of the enactment of this Act.

(2) Proposed final regulations under such section shall be published in the Federal Register not later than 180 days after the date of the enactment of this Act.

(e) **EFFECTIVE DATE.**—The amendments made by subsections (a) and (b) shall apply to contracts for which solicitations are issued after the end of the 210-day period beginning on the date of the enactment of this Act.

SEC. 954. RECOVERY OF COSTS TO PROVIDE TECHNICAL DATA

(a) **IN GENERAL.**—(1) Chapter 137 of title 10, United States Code, is amended by adding after section 2327 (as added by section 951) the following new section:

“§2328. Release of technical data

“(a) **IN GENERAL.**—(1) The Secretary of Defense shall, if required to release technical data under section 552 of title 5 (relating to the Freedom of Information Act), release technical data to a person requesting such a release if the person pays all reasonable costs attributable to search and duplication.

“(2) The Secretary of Defense shall prescribe regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees under this section.

“(b) **DISPOSITION OF COSTS.**—An amount received under this section—

“(1) shall be retained by the Department of Defense or the element of the Department of Defense receiving the amount; and

“(2) shall be merged with and available for the same purpose and the same time period as the appropriation from which the costs incurred in complying with requests for technical data were paid.

“(c) **WAIVER.**—The Secretary of Defense shall waive the payment of costs required by subsection (a) which are in an amount greater than the costs that would be required for such a release of information under section 552 of title 5 if—

“(1) the request is made by a citizen of the United States or a United States corporation, and such citizen or corporation certifies that the technical data requested is required to enable such citizen or corporation to submit an offer or determine whether it is capable of submitting an offer to provide the product to which the technical data relates to the United States or a contractor with the United States (except that the Secretary may require the citizen or corporation to pay a deposit in an amount

government that, even if the required data had been provided, the government would not have agreed to a price increase. Finally, the section would restructure the existing Truth in Negotiations Act language to clarify its application.

The Senate recedes to the House with an amendment that would prohibit an offset, if the contractor intentionally withheld from the government information that would indicate a higher cost for an item or service and, thus, certified that the cost or pricing data it submitted was accurate, complete and current when, in fact, the contractor knew it to be false. The amendment would also clarify that a subcontractor may be required to provide cost or pricing data even though the requirement has been waived for the prime contractor or higher-tier subcontractor. The conferees acknowledge the practice of the Department of Defense to waive the requirement for certified cost or pricing data for universities under cost no-fee contracts but to require such data from subcontractors of the university.

The conferees were very concerned with clarifying the definition of cost or pricing data that a contractor is not required to provide and certify to data relating to judgments, business strategies, plans for the future or estimates. A contractor is required, on the other hand, to disclose any information relating to execution or implementation of any such strategies or plans. For example, a corporate decision to attempt to negotiate a new labor wage rate structure with its employee union, although verifiable, is not cost or pricing data for purposes of this section. If the company has made an offer to the union, the fact that an offer has been made, and the details and status of the offer, on the other hand, is information that should be conveyed to the government. Finally, this provision was amended to clarify that it applies to contracts and modifications to contracts entered into after the effective date of this Act.

Thus, the provisions of this Act apply only as to information provided to support a new contract or the exercise of an option or modification of an existing contract but not to the cost or pricing data provided to support an existing contract entered into prior to the effective date.

Rights in technical data (sec. 953)

The Senate bill contained a provision (sec. 953) that would require the Secretary of Defense to prescribe regulations defining the rights of the United States, its contractors and subcontractors, in technical data relating to items sold to the Department of Defense.

The House amendment contained a similar provision (sec. 913).

The Senate recedes with an amendment.

The conferees agreed to the House provision which would require the Department of Defense to publish regulations defining the terms "developed" and "at private expense". Efforts to define the terms have been ongoing since 1962 without resolution. Because of the lack of definitions in the Federal Acquisition Regulations and the Defense Supplement to those regulations, the military departments have differed in their approach on the issue. The conferees agreed that a uniform approach throughout the Department of Defense was desirable and necessary. In addition, the conferees believe that every effort should be made to make the policy and defi-

nitions similar in the Department of Defense and the civilian agencies to the extent the agencies are dealing with similar items.

Although agreeing that some flexibility in defining terms is necessary, the conferees believe that a statement of congressional intent is appropriate. The conferees believe that previously proposed Department of Defense regulations published for public comment September 10, 1985, defined the term "developed" in an excessively stringent manner by requiring an "actual reduction to practice"—a term of art used to establish an inventor's priority rights under the patent laws. The conferees agree that, for purposes of determining whether an item or process has been developed at private expense, an item should generally be considered "developed" if the item or process exists and reasonable persons skilled in the applicable art would conclude that a high probability exists that the item or process will work as intended. The conferees determined, however, that, because circumstances may exist in which such a standard may be inappropriate, crafting of more exact parameters would be better accomplished through the regulatory process.

In addition, the conferees agree that as a matter of general policy "at private expense" development was accomplished without direct government payment. Payments by the government to reimburse a contractor for its indirect costs would not be considered in determining whether the government had funded the development of an item. Thus, reimbursement for Independent Research and Development expenses and other indirect costs (capital funds and profits), although such payments are in indirect support of a development effort, are treated for purposes of this Act as contractor funds.

The conferees also agreed that, although Congress has mandated increased competition in the Department of Defense's acquisition of goods and services, many alternatives exist to achieve that goal and do so more effectively, without coercing contractors and subcontractors into relinquishing legitimate rights in technical data. On the other hand, where the government is likely to purchase a substantial number of these items in the future, the government should attempt to acquire unlimited rights in data for items developed at private expense.

The Department of Defense should generally seek to acquire the same rights in data that a commercial customer would in acquiring the same product. For example, if a contractor were to purchase an item in the commercial sector, it would not receive unlimited rights to use, release or disclose technical data necessary to manufacture the item or perform the necessary processes to manufacture the item. If a contractor paid for a modification to an existing item, it may acquire rights in data to the modification but not the rights to use, release or disclose data to the underlying product. If, on the other hand, one contractor pays another contractor to develop a new item, the purchasing contractor, to some extent, is paying for the expertise of the developing contractor and, if so, is likely to acquire the rights to manufacture or release and disclose the data to someone else to manufacture. In the event funds are mixed in such a way that no clear allocation of funds from either party to the development of a segregable item can be determined, the par-

ties should agree to the rights to be accorded each party. The same applies to the government in contracting with its suppliers.

When entering into a contract with a supplier for which the government will fund directly a portion of the development costs, the government must evaluate whether its contribution is substantial enough to warrant the government's unlimited rights to use, release or disclose technical data pertaining to that item. The Department of Defense should establish by policy negotiation objectives to be used as guidance in determining whether the government should acquire rights when the contractor would be entitled to retain them and the trade-off when paying for some portion of the development. Such guidance should factor into account the number of items to be purchased in the future, the amount of funding contributed by the government, if any, and other variables that would take into account the benefit to be achieved by the government acquiring unlimited rights to use, release or disclose such data. The conferees agree that such guidance should also provide that, with exception, the government should not require a contractor to provide technical data relating to commercial products, except that data necessary for maintenance, repair and training.

Notwithstanding the above, the government should continue to evaluate, in determining which contractor should receive a contract, whether the government will have the ability to compete the item in future acquisitions—either through the acquisition of data rights or a requirement to develop alternative sources.

The conferees agreed to make the provisions of this section applicable in 210 days. The Department of Defense is required to issue proposed regulations within 90 days and final regulations within 180 days. This will allow the public to comment on the proposed regulations, as well as review the final regulations 30 days prior to their effective date. The conferees hope that with the requirement to publish the final rules 30 days before they become effective the public will have the opportunity to review the regulations as they have been adjusted from the initial proposed regulations, prior to their becoming effective. Finally, the amendment would clarify that the validation procedures required under this section apply only as to technical data delivered under contracts entered into after the effective date of this Act. As to data required to be delivered under contracts entered into prior to the effective date, the standards in effect on the date the contract was entered into continue to apply.

The conferees also agreed to the Senate provision requiring notification to a contractor that technical data delivered with restricted rights was released or disclosed under section 2320(D). The conferees wish to make clear that the notification need not be made prior to the government's release, but should be made as soon as reasonably possible.

Recovery of costs to provide technical data (sec. 954)

The House amendment contained a provision (sec. 935) that would authorize the government to charge those who do not need the technical data to bid on a government contract an amount equal to the true administrative cost of searching for and reproducing the data. The provision would require the release of data at no

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Calendar No. 646

100TH CONGRESS
2d Session

SENATE

REPORT
100-326

**NATIONAL DEFENSE AUTHORIZATION ACT
FOR FISCAL YEAR 1989**

REPORT

[TO ACCOMPANY S. 2355]

ON

AUTHORIZING APPROPRIATIONS FOR FISCAL YEAR 1989 FOR MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE, FOR MILITARY CONSTRUCTION, AND FOR DEFENSE ACTIVITIES OF THE DEPARTMENT OF ENERGY, TO PRESCRIBE PERSONNEL STRENGTHS FOR SUCH FISCAL YEAR FOR THE ARMED FORCES, AND FOR OTHER PURPOSES

TOGETHER WITH

ADDITIONAL AND SUPPLEMENTAL VIEWS

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE



MAY 4, 1988.—Ordered to be printed

Filed under authority of the order of the Senate of April 27 (legislative day, April 25), 1988

In addition, the legislation codifies and revises a requirement established last year requiring approval by the Under Secretary of Defense for Acquisition of certain firm-fixed price development contracts valued at more than \$10,000,000. The committee emphasizes that this dollar-value, and the reference to firm-fixed price contracts, relates solely to the approval authority of the Under Secretary, and does not reflect a judgment that fixed-price development contracts are appropriate simply because they are of a lesser value or involve a contract form other than firm fixed-price. The committee recognizes that there are circumstances in which fixed-price development contracts are appropriate (e.g., when costs and foreseeable program risks can be reasonably anticipated), and the committee expects the Department to establish clear guidelines under this section for use of such contracts.

It is the intent of the committee that this section be applied in a manner that best serves the government's interests in the long-term health of the defense industry, and that this section not be used as the basis for litigating the propriety of an otherwise valid contract. Nothing in this section shall be construed to affect the requirements of section 8118 of the Department of Defense Appropriations Act, 1988.

INCENTIVES FOR INNOVATION

Section 803 amends 10 U.S.C. 2305 which recognizes the value to the Nation of innovation by defense contractors using private funding. Private expense development for defense purposes enhances our ability to pursue a defense strategy based on technological superiority. As a consequence, the government has an interest in preserving an incentive for private industry to accept the risks inherent in such investment.

The amendment to section 2305 would prohibit the government from requiring that a prime contractor provide for competition between identical items in cases where an item has been developed exclusively at private expense. The amendment would allow the head of an agency to require such competition in cases in which he determines that the price of an privately-developed item is unreasonable or that the developer of the item cannot meet the program schedule or delivery requirements. The amendment also provides for the satisfaction of mobilization needs through negotiations between the government and the developer of the item. Finally, subparagraph (C) is intended to ensure that those prime contractors who choose to rely on privately-developed items in the products they offer to the government are not placed at a disadvantage in the proposal evaluation process for a contract.

The amendment would not restrict the government's ability to pursue competition for privately-developed items through the use of performance specifications, reverse engineering, or form, fit and function standards. It would, however, provide a necessary counterbalance to the presumptions in the current law, which have resulted in mandatory requirements for innovative subcontractors to disclose the results of privately-funded research to competitors.

NATIONAL DEFENSE AUTHORIZATION ACT,
FISCAL YEAR 1989

CONFERENCE REPORT

TO ACCOMPANY

H.R. 4264



JULY 7, 1988.—Ordered to be printed

(2) In developing the recommendations, the advisory committee shall address the following issues:

(A) How the Department of Defense can best be assured that it receives the best quality services for the amounts expended and that the contractors supplying such services follow sound personnel management practices and observe established labor-management policies and regulations.

(B) Whether contract competitions should be structured in a manner that requires offerors to compete on the basis of factors other than the number of hours per week its professional and technical employees of similar annual salaries work.

(C) Whether the Department of Defense can allow contractors to maintain different accounting systems (for example, 40-hour work week, full time accounting) and still allow the Department to evaluate proposals on the basis of a work rate of 40 hours per week and 2,080 hours per year.

SEC. 805. PROCUREMENT OF CRITICAL AIRCRAFT AND SHIP SPARE PARTS

(a) **IN GENERAL.**—(1) Chapter 141 of title 10, United States Code, is amended by inserting after section 2382 the following:

“§ 2383. Procurement of critical aircraft and ship spare parts: quality control

“(a) In procuring any spare or repair part that is critical to the operation of an aircraft or ship, the Secretary of Defense shall require the contractor supplying such part to provide a part that meets all appropriate qualification and contractual quality requirements as may be specified and made available to prospective offerors. In establishing the appropriate qualification requirements, the Secretary of Defense shall utilize those requirements, if available, which were used to qualify the original production part, unless the Secretary of Defense determines in writing that any or all such requirements are unnecessary.

“(b) In this section, the term ‘spare or repair part’ has the meaning given such term by section 2323(f) of this title.”

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2382 the following new item:

“2383. Procurement of critical aircraft and ship spare parts: quality control on second sources.”

(b) **EFFECTIVE DATE.**—Section 2383 of title 10, United States Code, as added by subsection (a), shall apply with respect to contracts entered into after the end of the 180-day period beginning on the date of the enactment of this Act.

SEC. 806. INCENTIVES FOR INNOVATION

(a) **IN GENERAL.**—(1) Section 2305(d) of title 10, United States Code, is amended by adding at the end the following:

“(4)(A) Whenever the head of an agency requires that proposals described in paragraph (1)(B) or (2)(B) be submitted by an offeror in its offer, the offeror shall not be required to provide a proposal that enables the United States to acquire competitively in the future an identical item if the item was developed exclusively at private expense unless the head of the agency determines that—

"(i) the original supplier of such item will be unable to satisfy program schedule or delivery requirements; or

"(ii) proposals by the original supplier of such item to meet the mobilization requirements are insufficient to meet the agency's mobilization needs.

"(B) In considering the responses to solicitations requiring proposals described in paragraph (1)(B) or (2)(B), the head of an agency shall base any evaluation of items developed exclusively at private expense on an analysis of the total value, in terms of innovative design, life cycle costs, and other pertinent factors, of incorporating such items in the system."

(2) Section 2305(d)(3) of such title is amended by adding at the end the following: "Such objectives may not impair the rights of prospective contractors or subcontractors otherwise provided by law."

(b) CLARIFYING AMENDMENT.—Paragraphs (1)(B) and (2)(B) of such section are each amended by inserting "response to" before "a solicitation".

SEC. 807. REGULATIONS ON USE OF FIXED-PRICE DEVELOPMENT CONTRACTS

(a) IN GENERAL.—(1) Not later than 120 days after the date of the enactment of this Act, the Secretary of Defense shall revise the Department of Defense regulations that provide for the use of fixed-price type contracts in a development program. The regulations shall provide that a fixed-price contract may be awarded in such a program only if—

(A) the level of program risk permits realistic pricing; and

(B) the use of a fixed-price contract permits an equitable and sensible allocation of program risk between the United States and the contractor.

(2)(A) The regulations also shall provide that a firm fixed-price contract in excess of \$10,000,000 may not be awarded for the development of a major system.

(B) A waiver of the requirement prescribed in regulations under subparagraph (A) may be granted by the Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, but only if the Secretary determines and states in writing that the award is consistent with the criteria specified in clauses (A) and (B) of paragraph (1) and the regulations prescribed under such paragraph. The Secretary may delegate the authority in the preceding sentence only to a person who holds a position in the Office of the Secretary of Defense at or above the level of Assistant Secretary of Defense.

(b) DEFINITIONS.—In this section, the term "major system" has the meaning given such term by section 2302(5) of such title.

(c) EXPIRATION.—Paragraph (2) of subsection (a) shall cease to be effective two years after the date of the enactment of this Act.

SEC. 808. DEPARTMENT OF DEFENSE ADVISORY PANEL ON GOVERNMENT-INDUSTRY RELATIONS

(a) ESTABLISHMENT OF ADVISORY PANEL.—Not later than 30 days after the date of the enactment of this Act, the Secretary of Defense shall establish an advisory panel to study and make recommendations to the Secretary on ways to enhance cooperation between the

Procurement of critical spare parts (sec. 805)

The House bill contained a provision (sec. 808) that would require the Secretary of Defense to procure critical spare or repair parts for ships and aircraft that meet the same quality and inspection requirements as the original parts.

The Senate amendment contained a provision (sec. 822) that would require the Secretary of Defense to use, in procuring critical spare or repair parts for aircraft, qualification and quality requirements that were at least as stringent as those that applied to the original or original redesigned parts.

The Senate recedes with an amendment requiring that the head of an agency, when purchasing critical spare or repair parts, use all appropriate quality and qualification requirements as may be specified and made available to potential offerors. In determining the appropriate qualification and quality requirements, the head of an agency is required to utilize the requirements used to qualify the original production part, unless he determines in writing that any or all such requirements are unnecessary.

The conferees support the efforts by the Services to increase significantly competition in the procurement of critical spare or repair parts and this provision is not intended to supersede any law or regulation, including section 2319 of title 10, United States Code. However, the conferees are equally concerned that quality and safety not be compromised in procuring critical spare or repair parts. They recognize that there are circumstances in which it may not be necessary to apply the same qualification and quality requirements used during the development or early production stages of a defense program to a part procured to support a fielded system. They also recognize that as technology changes qualification requirements change. However, the qualification and quality requirements applied to critical original production parts should serve as the baseline and subsequent modifications should be documented.

The conferees intend to continue monitoring this issue and direct the General Accounting Office to prepare and submit a report within one year on the implementation of this section and the procedures used by the Services to ensure the necessary level of quality in critical spare parts procurement. The review should focus on parts procured from original equipment manufacturers as well as parts procured from other sources. The report should review any criteria used to designate parts as critical parts and, to the extent that quality deficiencies in such critical parts can be traced and documented, any organizational or systemic causes which might lead to the procurement of critical parts of insufficient quality.

Incentives for innovation (sec. 806)

The Senate amendment contained a provision (sec. 803) that would prevent the Government from requiring that a prime contractor provide for competition between identical items in cases where an item has been developed exclusively at private expense. The Senate provision would allow the head of an agency to require such competition in certain circumstances. In addition, the Senate provision would require the Department of Defense to evaluate pro-

posals from prime contractors who rely on privately-developed items in a manner that accommodates the objectives of this provision.

The House bill contained no similar provision.

The House recedes with an amendment that makes technical changes and that requires DOD, in considering the responses to proposals described in subparagraphs (1)(B) or (2)(B) of section 2305(d) of title 10, United States Code, to evaluate items developed exclusively at private expense on the basis of an analysis of the total value of incorporating such items in the system.

Regulations on use of fixed price development contracts (sec. 807)

The Senate amendment contained a provision (sec. 802) that would require the Secretary of Defense to prescribe guidelines limiting the use of fixed price contracts for development programs. The Senate provision also would preclude use of firm-fixed price development contracts in excess of \$10 million unless approved by the Under Secretary of Defense for Acquisition.

The House bill contained no similar provision.

The House recedes with a clarifying amendment.

The conferees note that current Department of Defense rules discourage the use of fixed price development contracts, but do not provide sufficient guidance for assessment of the relationship between pricing and program risk, and for the allocation of risk between the United States and the contractor. The conferees expect the revised regulations to provide a greater level of detail with respect to these matters.

The conferees emphasize that the expiration of the \$10 million statutory limit on firm-fixed price contracts after two years does not signal any intent or expectation that the regulatory limitations will be changed substantially at that time; rather, it reflects a belief that a two-year statutory period is sufficient to focus the Department's attention on this problem. The Congress can monitor the Department's performance after that period through the oversight process without the necessity for mandatory involvement by the Under Secretary in specific cases, except to the extent that the Under Secretary believes at that time that such continuing involvement is necessary.

Department of Defense Advisory Panel on government-industry relations (sec. 808)

The Senate amendment contained a provision (sec. 811) that would require the Secretary of Defense to establish an advisory panel on government-industry relations.

The House bill contained no similar provision.

The House recedes.

Report on simplification and streamlining of acquisition procedures (sec. 809)

The Senate amendment contained a provision (sec. 810) requiring the Under Secretary of Defense for Acquisition to submit to Congress a report on the Under Secretary's programs regarding simplification of procedures governing the acquisition process.

102D CONGRESS
1st Session

SENATE

REPORT
102-113

**NATIONAL DEFENSE AUTHORIZATION ACT
FOR FISCAL YEARS 1992 AND 1993**

REPORT

[TO ACCOMPANY S. 1507]

ON

AUTHORIZING APPROPRIATIONS FOR FISCAL YEARS 1992 AND 1993
FOR MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE,
FOR MILITARY CONSTRUCTION, AND FOR DEFENSE ACTIVITIES
OF THE DEPARTMENT OF ENERGY, TO PRESCRIBE PERSONNEL
STRENGTHS FOR SUCH FISCAL YEARS FOR THE ARMED FORCES,
AND FOR OTHER PURPOSES

TOGETHER WITH

ADDITIONAL VIEWS

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE



JULY 19 (legislative day, JULY 8), 1991.—Ordered to be printed

the term "domestically manufactured" is defined to mean manufactured in a facility located in the United States or Canada by an entity more than 50 percent of which is owned or controlled by U.S. or Canadian citizens.

Since this provision was enacted into law, a great deal of concern has been raised over its potential effects. In particular, the provision creates a monopoly for the single U.S. manufacturer of this material. The committee is concerned that the price, quality, and delivery of materials to the Defense Department or its contractors could be unfairly controlled by a monopoly producer. Another concern with section 2507(e) is that its bar on foreign ownership discourages foreign-owned manufacturers of carbonyl iron powders from establishing a production facility in the United States or Canada. The committee does not believe that such a prohibition on foreign ownership is justified in this case.

In light of these concerns, the committee recommends a provision that would amend section 2507(e) in two ways. First, it would advance the date after which the Secretary of Defense may terminate this restriction from September 30, 1994 to September 30, 1992. Second, it would allow a foreign-owned manufacturing facility located in the United States or Canada to supply carbonyl iron powders to the Defense Department or its contractors.

ADVISORY COMMITTEE ON RIGHTS IN TECHNICAL DATA

Balancing contractor and government rights in technical data is a problem that has concerned Congress, DOD and industry throughout the 1980s. Since 1984, the Congress has significantly amended the statute on technical data (10 U.S.C. 2320) three times. An interim regulation has been in effect since October 1988. The absence of a final regulation reflects deep divisions as to the appropriate balance of these interests.

The committee recommends a provision that would establish an Advisory Committee on Rights in Technical Data in an effort to resolve current differences. The committee would be composed of 16 members, half from government and half from the private sector. The committee would submit a report containing a proposed regulation by May 1, 1992. The Secretary of Defense would be required to give thorough consideration to the Advisory Committee's proposal, and issue a final regulation by June 1, 1992.

The committee intends that the Secretary ensure that other agencies of government with a significant interest in technical data rights, such as the Office of Federal Procurement Policy, are represented. To ensure the recommendations of the advisory committee receive full consideration, the Department of Defense should not issue any comprehensive revisions to the current regulations on technical data until the work of the advisory committee is completed.

DEFENSE CRITICAL TECHNOLOGIES PLAN

The third annual *Defense Critical Technologies Plan* was issued on May 1, 1991. The committee commends the Defense Department on the progress they have over the past year in preparing this plan and especially in the strong participation of industry evident in it.

NATIONAL DEFENSE AUTHORIZATION
ACT FOR FISCAL YEARS 1992 AND 1993

CONFERENCE REPORT

TO ACCOMPANY

H.R. 2100



NOVEMBER 13, 1991.—Ordered to be printed

graph (2) and may include recommendations pertaining to any of the following:

(A) Statutory and regulatory changes providing payment protections for subcontractors and suppliers (other than a construction prime contractor subject to the provisions of sections 3903(b) and 3905 of title 31, United States Code) that the Comptroller General believes to be desirable and feasible.

(B) Proposals to assess the desirability and utility of a specific payment protection on a test basis.

(C) Such other recommendations as the Comptroller General considers appropriate in light of the matters assessed pursuant to paragraph (2).

(4) The report required by paragraph (1) shall be submitted not later than by February 1, 1993, to the Committees on Armed Services and on Small Business of the Senate and House of Representatives.

(f) INSPECTOR GENERAL REPORT.—(1) The Inspector General of the Department of Defense shall submit to the Secretary of Defense a report on payment protections for subcontractors and suppliers under contracts entered into with the Department of Defense. The report shall include an assessment of the extent to which available judicial and administrative remedies, as well as suspension and debarment procedures, have been used (or recommended for use) by officials of the Department to deter false statements relating to (A) payment bonds provided by individuals pursuant to the Miller Act, and (B) certifications pertaining to payment requests by construction contractors pursuant to section 3903(b) of title 31, United States Code. The assessment shall cover actions taken during the period beginning on October 1, 1989, and ending on September 30, 1992.

(2) The report required by paragraph (1) shall be submitted to the Secretary of Defense not later than March 1, 1993. The report may include recommendations by the Inspector General on ways to improve the effectiveness of existing methods of preventing false statements.

(g) MILLER ACT DEFINED.—For purposes of this section, the term "Miller Act" means the Act of August 24, 1935 (40 U.S.C. 270a-270d).

SEC. 807. GOVERNMENT-INDUSTRY COMMITTEE ON RIGHTS IN TECHNICAL DATA.

(a) REGULATIONS.—(1) Not later than September 15, 1992, the Secretary of Defense shall prescribe final regulations required by subsection (a) of section 2320 of title 10, United States Code, that supersede the interim regulations prescribed before the date of the enactment of this Act for the purposes of that section.

(2) In prescribing such regulations, the Secretary shall give thorough consideration to the recommendations of the government-industry committee appointed pursuant to subsection (b).

(3) Not less than 30 days before prescribing such regulations, the Secretary shall—

(A) transmit to the Committees on Armed Services of the Senate and House of Representatives a report containing such regulations, the recommendations of the committee, and any matters required by subsection (b)(4); and

(B) publish such regulations for comment in the Federal Register.

(4) The regulations shall apply to contracts entered into on or after November 1, 1992, or, if provided in the regulations, an earlier date. The regulations may be applied to any other contract upon the agreement of the parties to the contract.

(b) GOVERNMENT-INDUSTRY COMMITTEE.—(1) Not later than 60 days after the date of the enactment of this Act, the Secretary of Defense shall appoint a government-industry committee for the purpose of developing regulations to recommend to the Secretary of Defense for purposes of carrying out subsection (a).

(2) The membership of the committee shall include, at a minimum, representatives of the following:

(A) The Under Secretary of Defense for Acquisition.

(B) The acquisition executives of the military departments.

(C) Prime contractors under major defense acquisition programs.

(D) Subcontractors and suppliers under major defense acquisition programs.

(E) Contractors under contracts other than contracts under major defense acquisition programs.

(F) Subcontractors and suppliers under contracts other than contracts under major defense acquisition programs.

(G) Small businesses.

(H) Contractors and subcontractors primarily involved in the sale of commercial products to the Department of Defense.

(I) Contractors and subcontractors primarily involved in the sale of spare or repair parts to the Department of Defense.

(J) Institutions of higher education.

(3) Not later than June 1, 1992, the committee shall submit to the Secretary a report containing the following matters:

(A) Proposals for the regulations to be prescribed by the Secretary pursuant to subsection (a).

(B) Proposed legislation that the committee considers necessary to achieve the purposes of section 2320 of title 10, United States Code.

(C) Any other recommendations that the committee considers appropriate.

(4) If the Secretary omits from the regulations prescribed pursuant to subsection (a) any regulation proposed by the advisory committee, any regulation proposed by a minority of the committee in any minority report accompanying the committee's report, or any part of such a proposed regulation, the Secretary shall set forth his reasons for each such omission in the report submitted to Congress pursuant to subsection (a)(3)(A).

(c) RESTRICTION.—(1) Before the date described in paragraph (2), the Secretary may not revise or supersede the interim regulations implementing section 2320 of title 10, United States Code, prescribed before the date of the enactment of this Act, except to the extent required by law or necessitated by urgent and unforeseen circumstances affecting the national defense.

(2) The date referred to in paragraph (1) is the date 30 days following the date on which the report required by subsection (a)(3) is

transmitted to the Committees on Armed Services of the Senate and House of Representatives.

(d) **DEFINITION.**—In this section, the term “major defense acquisition program” has the meaning given such term by section 2430 of title 10, United States Code.

SEC. 808. CONTROL OF GOVERNMENT PERSONNEL WORK PRODUCT.

(a) **REQUIREMENT.**—The Secretary of Defense shall prescribe regulations to ensure that—

(1) a Department of Defense employee or member of the armed forces with an appropriate security clearance who is engaged in oversight of an acquisition program of the Department of Defense (including a program involving highly sensitive information) maintains control of the employee's or member's work product; and

(2) procedures for protecting unauthorized disclosure of classified information by contractors do not require such an employee or member to relinquish control of his or her work product to any such contractor.

(b) **REGULATIONS.**—The Secretary of Defense shall prescribe the regulations required by subsection (a) not later than 120 days after the date of the enactment of this Act.

(c) **SUNSET.**—This section shall cease to be effective on September 30, 1992.

SEC. 809. STATUS OF THE DIRECTOR OF DEFENSE PROCUREMENT.

For the purposes of the amendment made by section 807 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510; 104 Stat. 1593) to section 25(b)(2) of the Office of Federal Procurement Policy Act (41 U.S.C. 421(b)(2)), the Director of Defense Procurement of the Department of Defense shall be considered to be an official at an organizational level of an Assistant Secretary of Defense within the Office of the Under Secretary of Defense for Acquisition.

PART B—ACQUISITION ASSISTANCE PROGRAMS

SEC. 811. PROCUREMENT TECHNICAL ASSISTANCE COOPERATIVE AGREEMENT PROGRAM.

(a) **AVAILABILITY OF AUTHORIZED APPROPRIATIONS.**—Of the amounts authorized to be appropriated pursuant to section 301 for Defense Agencies for fiscal years 1992 and 1993 for operation and maintenance, \$9,000,000 shall be available for each such fiscal year for carrying out the provisions of chapter 142 of title 10, United States Code.

(b) **SPECIFIC PROGRAMS.**—Of the amounts provided for in subsection (a), \$600,000 shall be available for each of fiscal years 1992 and 1993 for the purpose of carrying out programs sponsored by eligible entities referred to in subparagraph (D) of section 2411(1) of title 10, United States Code, that provide procurement technical assistance in distressed areas referred to in subparagraph (B) of section 2411(2) of such title. If there is an insufficient number of satisfactory proposals for cooperative agreements in such distressed areas to allow for effective use of the funds made available in accordance with this subsection in such areas, the funds shall be allocated among

dies, as well as suspension and debarment procedures, have been used to deter false statements and false payment certifications.

Government-industry committee on rights in technical data (sec. 807)

The Senate amendment contained a provision (sec. 834) that would establish a government-industry committee on rights in technical data in an effort to resolve current differences concerning the appropriate balance between contractor and government rights in such data.

The House bill contained no similar provision.

The House recedes with an amendment that would make clarifying changes in the provision and that would ensure that the Department of Defense not issue a new technical data rights regulation until the Secretary has considered the recommendations of the government-industry committee.

Control of government personnel work product (sec. 808)

The House bill contained a provision (sec. 814) that would require the Department of Defense to ensure that appropriately cleared Department of Defense personnel engaged in oversight of acquisition programs, including classified programs, maintain control of their work product.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment. The conferees agree that oversight personnel should not relinquish control of their work product to contractors who are the subject of their oversight. The conferees understand that the Department of Defense has been developing guidance, but has been slow in issuing the necessary regulation. Accordingly, this provision would require issuance of such a regulation. The conferees note that after an appropriate regulation is issued, a statutory requirement will no longer be necessary. Therefore, the conferees agree to "sunset" the provision on September 30, 1992, but expect the Department of Defense to ensure that an effective regulation continues in effect after that date. In the event that an appropriate regulation is not issued, the conferees agree that detailed legislative guidance may be required.

Status of the Director of Defense Procurement (sec. 809)

The Senate amendment contained a provision (sec. 822) that would authorize the Under Secretary of Defense for Acquisition to delegate the Under Secretary's responsibility to represent the Department at the Federal Acquisition Regulatory Council to the Director of Defense Procurement.

The House bill contained no similar provision.

The House recedes.

Procurement technical assistance cooperative agreement program (sec. 811)

The Senate amendment contained a provision (sec. 825) that would authorize \$9.0 million for the procurement technical assistance cooperative agreement program in each of fiscal years 1992 and 1993.

The House bill contained a similar provision (sec. 801).

NATIONAL DEFENSE AUTHORIZATION ACT
FOR FISCAL YEAR 2007

R E P O R T

OF THE

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES

ON

H.R. 5122

together with

ADDITIONAL AND DISSENTING VIEWS

[Including cost estimate of the Congressional Budget Office]



MAY 5, 2006.—Committed to the Committee of the Whole House on the
State of the Union and ordered to be printed

tribute to the outcomes of MDAPs. This section would require the Under Secretary of Defense for Acquisition, Technology and Logistics to ensure compliance with the training program.

Section 802—Additional Requirements Relating to Technical Data Rights

This section would require the Secretary of Defense to establish regulations to ensure that a major system developed with federal or private funds acquires sufficient technical data to allow competition for contracts required for sustainment of the system. This section would also require any contract for a major system to include price and delivery options for acquiring, at any point during the lifecycle of the system, major elements of technical data not acquired at the time of initial contract award. The regulations would establish a standard for acquiring rights in technical data to enable the lowest possible lifecycle cost for the item or process acquired.

The committee notes, in recent years, acquisition program managers have minimized their purchases of technical data rights for new weapons systems. The committee understands that guidance issued in the 1990s intentionally sought to reverse the previous policy on technical data rights, which may have inappropriately assumed that all rights to technical data should be purchased, even in unnecessary situations. This section would require program managers to negotiate price options for acquiring additional data rights, at the time of award, when the government has maximum leverage in negotiations. The committee believes that this balanced approach will require program managers to buy those data rights necessary to minimize lifecycle cost without requiring the purchase of unneeded technical data rights.

Section 803—Study and Report on Revisions to Selected Acquisition Report Requirements

This section would require the Under Secretary of Defense for Acquisition, Technology and Logistics, in coordination with the service acquisition executives of each military department, to conduct a study on revisions to requirements related to Selected Acquisition Reports (SARs), as set forth in section 2432 of title 10, United States Code.

The SAR provides the committee with a critical tool for providing oversight of major defense acquisition programs. The SAR gives the committee access to clear and regular information on program progress, including information of a classified nature. The committee understands that the elements currently required to be included in the SAR have not been updated for a number of years. Some important elements of program progress are not included in the current SAR, and in some cases, information which may have previously been a good measure of program progress may no longer be as relevant to program oversight.

The committee recognizes that in order for the SAR to be useful to both the Department of Defense (DOD) and the committee, it should focus on those measures of program progress for major defense acquisition programs that are the most useful for oversight across a broad range of programs, without placing an undue reporting burden. One element in the current SAR that is clearly critical

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AUTHORIZATION
ACT FOR FISCAL YEAR 2007**

CONFERENCE REPORT

TO ACCOMPANY

H.R. 5122



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subject to chapter 87 of title 10, United States Code, who contribute significantly to other types of acquisitions by the Department of Defense.

(b) **APPLICABILITY.**—Effective on and after September 30, 2008, a member of the Armed Forces or an employee of the Department of Defense with authority to generate requirements for a major defense acquisition program may not continue to participate in the requirements generation process unless the member or employee successfully completes the certification training program developed under this section.

(c) **REPORTS.**—The Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives an interim report, not later than March 1, 2007, and a final report, not later than March 1, 2008, on the implementation of the training program required under this section.

SEC. 802. ADDITIONAL REQUIREMENTS RELATING TO TECHNICAL DATA RIGHTS.

(a) **ADDITIONAL REQUIREMENTS RELATING TO TECHNICAL DATA RIGHTS.**—Section 2320 of title 10, United States Code, is amended by adding at the end the following new subsection:

“(e) The Secretary of Defense shall require program managers for major weapon systems and subsystems of major weapon systems to assess the long-term technical data needs of such systems and subsystems and establish corresponding acquisition strategies that provide for technical data rights needed to sustain such systems and subsystems over their life cycle. Such strategies may include the development of maintenance capabilities within the Department of Defense or competition for contracts for sustainment of such systems or subsystems. Assessments and corresponding acquisition strategies developed under this section with respect to a weapon system or subsystem shall—

“(1) be developed before issuance of a contract solicitation for the weapon system or subsystem;

“(2) address the merits of including a priced contract option for the future delivery of technical data that were not acquired upon initial contract award;

“(3) address the potential for changes in the sustainment plan over the life cycle of the weapon system or subsystem; and

“(4) apply to weapon systems and subsystems that are to be supported by performance-based logistics arrangements as well as to weapons systems and subsystems that are to be supported by other sustainment approaches.”

(b) **MODIFICATION OF PRESUMPTION OF DEVELOPMENT EXCLUSIVELY AT PRIVATE EXPENSE.**—Section 2321(f) of title 10, United States Code, is amended—

(1) by striking “EXPENSE FOR COMMERCIAL ITEMS CONTRACTS.—In” and inserting “EXPENSE.—(1) Except as provided in paragraph (2), in”; and

(2) by adding at the end the following new paragraph:

“(2) In the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor (whether or not under a contract for commercial items) for a major system or a subsystem or component thereof on the basis that the major system, subsystem or component was developed exclusively at private expense, the challenge to the use or release re-

striction shall be sustained unless information provided by the contractor or subcontractor demonstrates that the item was developed exclusively at private expense."

(c) **REGULATIONS.**—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall revise regulations under section 2320 of title 10, United States Code, to implement subsection (e) of such section (as added by this section), including incorporating policy changes developed under such subsection into Department of Defense Directive 5000.1 and Department of Defense Instruction 5000.2.

SEC. 803. STUDY AND REPORT ON REVISIONS TO SELECTED ACQUISITION REPORT REQUIREMENTS.

(a) **STUDY REQUIREMENT.**—The Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, Technology, and Logistics in coordination with the service acquisition executives of each military department, shall conduct a study on revisions to requirements relating to Selected Acquisition Reports, as set forth in section 2432 of title 10, United States Code.

(b) **MATTERS COVERED.**—The study required under subsection (a) shall—

(1) focus on incorporating into the Selected Acquisition Report those elements of program progress that the Department of Defense considers most relevant to evaluating the performance and progress of major defense acquisition programs, with particular reference to the cost estimates and program schedule established when a major defense acquisition program receives Milestone B approval;

(2) address the need to ensure that data provided through the Selected Acquisition Report is consistent with data provided through internal Department of Defense reporting systems for management purposes; and

(3) include any recommendations to add to, modify, or delete elements of the Selected Acquisition Report, consistent with the findings of the study.

(c) **REPORT.**—Not later than March 1, 2007, the Secretary shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on the results of the study, including such recommendations as the Secretary considers appropriate.

SEC. 804. BIENNIAL UPDATES ON IMPLEMENTATION OF ACQUISITION REFORM IN THE DEPARTMENT OF DEFENSE.

(a) **BIENNIAL UPDATES REQUIREMENT.**—Not later than January 1 and July 1 of each year, beginning with January 1, 2007, the Secretary of Defense shall provide to the Committees on Armed Services of the Senate and the House of Representatives a report containing an update on the implementation of plans to reform the acquisition system in the Department of Defense.

(b) **MATTERS COVERED.**—Each report provided under subsection (a) shall cover the implementation of reforms of the processes for acquisition, including generation of requirements, award of contracts, and financial management. At a minimum, the reports shall take into account the recommendations made by the following:

(1) The Defense Acquisition Performance Assessment Panel.

(2) The Defense Science Board Summer Study on Transformation, issued in February 2006.

that all personnel with responsibility for developing such requirements receive certification training by September 30, 2008.

The conferees believe that the training program established in accordance with this provision should address:

- (1) the interrelationship between the requirements, budget, and acquisition processes;
- (2) the importance of developing requirements that facilitate joint operations;
- (3) the need to ensure that requirements are developed early in a program and the adverse effect of introducing new requirements after the commencement of system development and demonstration;
- (4) the linkage between requirements and capability shortfalls identified by combatant commanders;
- (5) the need for sound analysis of alternatives, realistic technical assessments based on technology readiness levels, and consultation with production engineers on the cost, schedule, and technical feasibility of requirements;
- (6) the need for engineering feasibility assessments that weigh the technology readiness, integration, cost, and schedule impacts of proposed changes to requirements;
- (7) the importance of developing requirements that are technologically mature, feasible, and achievable; and
- (8) the importance of stable requirements to provide the baseline for successful program execution.

Additional requirements relating to technical data rights (sec. 802)

The House bill contained a provision (sec. 802) that would require the acquisition of full data rights necessary to support competition for contracts for sustainment of each major weapon system that is developed with federal or private funds. The provision would also require that any contract for a major system include options for acquiring, at any point during the life cycle of the system, major elements of technical data not acquired at the time of the initial contract award.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment that would direct the Under Secretary of Defense for Acquisition, Technology, and Logistics to require program managers to assess long-term technical data needs and establish corresponding acquisition strategies to ensure availability of technical data rights for major weapon system life cycle sustainment. The amendment would also modify title 10 of the United States Code to distinguish between commercial items and major weapon systems, subsystems, and components of major weapon systems (regardless of whether they may be characterized as commercial or non-commercial). In the case of a challenge made to a claim that the latter group of systems or components was developed exclusively at private expense, the burden of proof would be on the contractor or subcontractor.

Study and report on revisions to Selected Acquisition Report requirements (sec. 803)

The House bill contained a provision (sec. 803) that would require the Under Secretary of Defense for Acquisition, Technology,

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1st Session }

SENATE

{ REPORT
111-35 }**NATIONAL DEFENSE AUTHORIZATION
ACT FOR FISCAL YEAR 2010**

R E P O R T

[TO ACCOMPANY S. 1390]

ON

AUTHORIZING APPROPRIATIONS FOR FISCAL YEAR 2010 FOR MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE, TO PRESCRIBE MILITARY PERSONNEL STRENGTHS FOR FISCAL YEAR 2010, AND FOR OTHER PURPOSES

TOGETHER WITH

ADDITIONAL VIEWS

**COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE**

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Department of Defense training for acquisition and audit personnel.

Subtitle C—Contractor Matters

Authority for government support contractors to have access to technical data belonging to prime contractors (sec. 821)

The committee recommends a provision that would authorize the Department of Defense (DOD) to provide access to technical data delivered under a DOD contract to a support contractor, to enable the support contractor to furnish independent and impartial advice or technical assistance to DOD in support of DOD's management and oversight of the contract. The provision requires the support contractor to make a series of commitments, including exposure to criminal, civil, administrative, and contractual penalties, to ensure that such access is not abused.

Extension and enhancement of authorities on the Commission on Wartime Contracting in Iraq and Afghanistan (sec. 822)

The committee recommends a provision that would provide a 1-year extension for the Commission on Wartime Contracting in Iraq and Afghanistan, established pursuant to section 841 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181), in order to achieve expanded review and investigation into wartime contracting consistent with the Commission's charter.

The Commission shall continue to receive administrative support from the Washington Headquarters Service of the Department of Defense and may continue to receive support from other federal agencies to facilitate its work. The Department of Defense is directed to provide support to the Commission, on a non-reimbursable basis, for its investigatory work conducted in combat theaters including travel and lodging.

Prohibition on interrogation of detainees by contractor personnel (sec. 823)

The committee recommends a provision that would require the Secretary of Defense to issue regulations providing that the interrogation of detainees during or in the aftermath of hostilities is an inherently governmental function that cannot be transferred to private sector contractors. The regulations would become effective 1 year after the date of the enactment of this Act, to provide the Department of Defense time to comply.

The interrogation of detainees entails the exercise of substantial discretion in applying government authority and has frequently had a significant impact on the life and liberty of the individuals questioned. The committee concludes that the conduct of such interrogations is an inherently governmental function that should be performed exclusively by military or civilian employees of the Department.

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CONFERENCE REPORT

TO ACCOMPANY

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party concerning such acquisition under any other requirement of law or regulation.

(2) *DISCLOSURE*.—Nothing in this section shall be construed to require the public availability of information that is exempt from public disclosure under section 552(b) of title 5, United States Code, or is otherwise restricted from public disclosure by law or Executive order.

(3) *ISSUANCE OF SOLICITATION*.—Nothing in this section shall be construed to require a contracting officer to delay the issuance of a solicitation in order to meet the requirements of subsection (a) if the expedited issuance of such solicitation is otherwise authorized under any other requirement of law or regulation.

Subtitle C—Contractor Matters

SEC. 821. AUTHORITY FOR GOVERNMENT SUPPORT CONTRACTORS TO HAVE ACCESS TO TECHNICAL DATA BELONGING TO PRIME CONTRACTORS.

(a) *AUTHORITY FOR ACCESS TO TECHNICAL DATA*.—Subsection (c) of section 2320 of title 10, United States Code, is amended—

(1) in paragraph (1), by striking “or” at the end;

(2) by redesignating paragraph (2) as paragraph (3); and

(3) by inserting after paragraph (1) the following new paragraph (2):

“(2) notwithstanding any limitation upon the license rights conveyed under subsection (a), allowing a covered Government support contractor access to and use of any technical data delivered under a contract for the sole purpose of furnishing independent and impartial advice or technical assistance directly to the Government in support of the Government’s management and oversight of the program or effort to which such technical data relates; or”

(b) *COVERED GOVERNMENT SUPPORT CONTRACTOR DEFINED*.—Such section is further amended by adding at the end the following new subsection:

“(f) In this section, the term ‘covered Government support contractor’ means a contractor under a contract the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government’s management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), which contractor—

“(1) is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

“(2) executes a contract with the Government agreeing to and acknowledging—

“(A) that proprietary or nonpublic technical data furnished will be accessed and used only for the purposes stated in that contract;

"(B) that the covered Government support contractor will enter into a non-disclosure agreement with the contractor to whom the rights to the technical data belong;

"(C) that the covered Government support contractor will take all reasonable steps to protect the proprietary and nonpublic nature of the technical data furnished to the covered Government support contractor during the program or effort for the period of time in which the Government is restricted from disclosing the technical data outside of the Government;

"(D) that a breach of that contract by the covered Government support contractor with regard to a third party's ownership or rights in such technical data may subject the covered Government support contractor—

"(i) to criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

"(ii) to civil actions for damages and other appropriate remedies by the contractor or subcontractor whose technical data is affected by the breach; and

"(E) that such technical data provided to the covered Government support contractor under the authority of this section shall not be used by the covered Government support contractor to compete against the third party for Government or non-Government contracts."

SEC. 822. EXTENSION AND ENHANCEMENT OF AUTHORITIES ON THE COMMISSION ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN.

(a) **DATE OF FINAL REPORT.**—Subsection (d)(3) of section 841 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 122 Stat. 230) is amended by striking "two years" and inserting "three years".

(b) **ASSISTANCE FROM FEDERAL AGENCIES.**—Such section is further amended—

(1) by redesignating subsections (f) and (g) as subsections (g) and (h), respectively; and

(2) by inserting after subsection (e) the following new subsection (f):

"(f) **ASSISTANCE FROM FEDERAL AGENCIES.**—

"(1) **DEPARTMENT OF DEFENSE.**—The Secretary of Defense shall provide to the Commission administrative support for the performance of the Commission's functions in carrying out the requirements of this section.

"(2) **TRAVEL AND LODGING IN COMBAT THEATERS.**—The administrative support provided the Commission under paragraph (1) shall include travel and lodging undertaken in combat theaters, which support shall be provided through funds made available for that purpose through the Washington Headquarters Services or on a non-reimbursable basis, as appropriate.

"(3) **OTHER DEPARTMENTS AND AGENCIES.**—In addition to the support required by paragraph (1), any department or agency of the Federal Government may provide to the Commission such services, funds, facilities, staff, and other support services

The Senate recedes with an amendment that would require the publication of a notification that is consistent with existing requirements and includes a brief description of the benefits that are expected as a result of the bundling.

Subtitle C—Contractor Matters

Authority for Government support contractors to have access to technical data belonging to prime contractors (sec. 821)

The Senate amendment contained a provision (sec. 821) that would authorize the Department of Defense (DOD) to provide access to technical data delivered under a DOD contract to a support contractor providing advice and assistance to the government.

The House bill contained no similar provision.

The House recedes with an amendment that would: (1) delete the criminal penalties for disclosure of information; and (2) require the support contractor to agree to enter into a non-disclosure agreement with the contractor to whom the technical data rights belong. This modification would result in civil enforcement, rather than criminal enforcement, for violations of the non-disclosure requirements in the provision.

Extension and enhancement of authorities on the Commission on Wartime Contracting in Iraq and Afghanistan (sec. 822)

The Senate amendment contained a provision (sec. 822) that would extend the life of the Commission on Wartime Contracting in Iraq and Afghanistan and clarify the nature of the support to be provided to the Commission by the Department of Defense and other federal agencies.

The House bill contained no similar provision.

The House bill recedes with a clarifying amendment.

Authority for Secretary of Defense to reduce or deny award fees to companies found to jeopardize health or safety of Government personnel (sec. 823)

The House bill contained a provision (sec. 824) that would prohibit the payment of award and incentive fees to any defense contractor that has been determined to have caused the death or serious bodily injury of Department of Defense personnel.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment that would: (1) require the Secretary of Defense to consider any such contractor misconduct in assessments of contractor performance; and (2) authorize the Secretary to withhold or recover all or part of award fees for the relevant period of time on the basis of the negative impact of such misconduct on contractor performance.

Subtitle D—Acquisition Workforce Matters

Enhancement of expedited hiring authority for defense acquisition workforce positions (sec. 831)

The House bill contained a provision (sec. 821) that would clarify the expedited hiring authority for the defense acquisition workforce in section 1705 of title 10, United States Code.

111TH CONGRESS }
2d Session }

SENATE

{ REPORT
111-201

**NATIONAL DEFENSE AUTHORIZATION
ACT FOR FISCAL YEAR 2011**

R E P O R T

[TO ACCOMPANY S. 3454]

ON

AUTHORIZING APPROPRIATIONS FOR FISCAL YEAR 2011 FOR MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE AND FOR MILITARY CONSTRUCTION, TO PRESCRIBE MILITARY PERSONNEL STRENGTHS FOR SUCH FISCAL YEAR, AND FOR OTHER PURPOSES

TOGETHER WITH

ADDITIONAL VIEWS

**COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE**



JUNE 4, 2010.—Ordered to be printed
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clusively at private expense to meet validated military requirements.

The committee notes that the streamlined acquisition procedures developed under this section may have a particular utility in the Department's efforts to rapidly field military capabilities in response to urgent operational needs.

Competition for production and sustainment and rights in technical data (sec. 832)

The committee recommends a provision that would require the Secretary of Defense to issue guidance on rights in technical data to ensure that the Department of Defense (DOD) preserves the option of competition for contracts for the production and sustainment of systems or subsystems that are developed exclusively with Federal funds or without significant contribution by a contractor or subcontractor and that the United States is not required to pay more than once for the same technical data. The provision would also provide DOD with improved tools to address situations in which a contractor has erroneously asserted a restriction on the use or release of technical data that was developed exclusively with Federal funds or without significant contribution by the contractor or subcontractor.

Elimination of sunset date for protests of task and delivery order contracts (sec. 833)

The committee recommends a provision that would amend section 2304c of title 10, United States Code, to eliminate the sunset date for protests of task and delivery orders under Department of Defense contracts. The sunset date was included in section 2304c to provide the committee an opportunity to adjust the provision if the new protest authority resulted in a surge of bid protests. In April 2009, the Government Accountability Office reported that only a handful of bid protests are attributable to the new authority. The committee concludes that no adjustment to the authority is needed.

Inclusion of option amounts in limitations on authority of the Defense Advanced Research Projects Agency to carry out certain prototype projects (sec. 834)

The committee recommends a provision that would clarify that the dollar thresholds applicable to prototype projects carried out pursuant to section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103-160) include all option amounts.

Enhancement of Department of Defense authority to respond to combat and safety emergencies through rapid acquisition and deployment of urgently needed supplies (sec. 835)

The committee recommends a provision that would amend section 806 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314), as amended by section 811 of the Ronald W. Reagan National Defense Authorization Act for Fiscal year 2005 (Public Law 108-375), to enhance the authority

IKE SKELTON
NATIONAL DEFENSE AUTHORIZATION ACT
FOR FISCAL YEAR 2011

COMMITTEE PRINT

OF THE

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES

LEGISLATIVE TEXT AND
JOINT EXPLANATORY STATEMENT

TO ACCOMPANY

H.R. 6523

PUBLIC LAW 111-383



DECEMBER 2010

(D) The actions the Department of Defense has taken to identify alternatives to fire resistant rayon fiber for the production of military uniforms.

(E) The extent to which such alternatives provide an adequate substitute for fire resistant rayon fiber for the production of military uniforms.

(F) The impediments to the use of such alternatives, and the actions the Department has taken to overcome such impediments.

(G) The extent to which uncertainty regarding the future availability of fire resistant rayon fiber results in instability or inefficiency for elements of the United States textile industry that use fire resistant rayon fiber, and the extent to which that instability or inefficiency results in less efficient business practices, impedes investment and innovation, and thereby results or may result in higher costs, delayed delivery, or a lower quality of product delivered to the Government.

(H) The extent to which any modifications to existing law or regulation may be necessary to ensure the efficient acquisition of fire resistant fiber or alternative fire resistant products for the production of military uniforms.

SEC. 822. REPEAL OF REQUIREMENT FOR CERTAIN PROCUREMENTS FROM FIRMS IN THE SMALL ARMS PRODUCTION INDUSTRIAL BASE.

(a) **REPEAL.**—Section 2473 of title 10, United States Code, is repealed.

(b) **CLERICAL AMENDMENT.**—The table of sections at the beginning of chapter 146 of such title is amended by striking the item relating to section 2473.

SEC. 823. REVIEW OF REGULATORY DEFINITION RELATING TO PRODUCTION OF SPECIALTY METALS.

(a) **REVIEW REQUIRED.**—The Secretary of Defense shall review the regulations specified in subsection (b) to ensure that the definition of the term “produce” in such regulations complies with the requirements of section 2533b of title 10, United States Code. In carrying out the review, the Secretary shall seek public comment, consider congressional intent, and revise the regulations as the Secretary considers necessary and appropriate.

(b) **REGULATIONS SPECIFIED.**—The regulations referred to in subsection (a) are any portion of subpart 252.2 of the defense supplement to the Federal Acquisition Regulation that includes a definition of the term “produce” for purposes of implementing section 2533b of title 10, United States Code.

(c) **COMPLETION OF REVIEW.**—The Secretary shall complete the review required by subsection (a) and any necessary and appropriate revisions to the defense supplement to the Federal Acquisition Regulation not later than 270 days after the date of the enactment of this Act.

SEC. 824. GUIDANCE RELATING TO RIGHTS IN TECHNICAL DATA.

(a) **REVIEW OF GUIDANCE.**—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall review guidance issued by the military departments on the imple-

mentation of section 2320(e) of title 10, United States Code, to ensure that such guidance is consistent with the guidance issued by the Under Secretary of Defense for Acquisition, Technology, and Logistics and the requirements of this section. Such guidance shall be designed to ensure that the United States—

(1) preserves the option of competition for contracts for the production and sustainment of systems or subsystems that are developed exclusively with Federal funds as defined in accordance with the amendments made by this section; and

(2) is not required to pay more than once for the same technical data.

(b) **RIGHTS IN TECHNICAL DATA.**—Section 2320(a) of title 10, United States Code, is amended—

(1) in paragraph (2)(F)(i)—

(A) by redesignating subclauses (I) and (II) as subclauses (II) and (III), respectively; and

(B) by inserting before subclause (II), as so redesignated, the following new subclause (I):

“(I) rights in technical data described in subparagraph (A) for which a use or release restriction has been erroneously asserted by a contractor or subcontractor;” and

(2) in paragraph (3), by striking “for the purposes of definitions under this paragraph” and inserting “for the purposes of paragraph (2)(B), but shall be considered to be Federal funds for the purposes of paragraph (2)(A)”.

(c) **VALIDATION OF PROPRIETARY DATA RESTRICTIONS.**—Section 2321(d)(2) of title 10, United States Code, is amended—

(1) in subparagraph (A), by striking “A challenge” and inserting “Except as provided in subparagraph (C), a challenge”; and

(2) by adding at the end the following new subparagraph (C):

“(C) The limitation in this paragraph shall not apply to a case in which the Secretary finds that reasonable grounds exist to believe that a contractor or subcontractor has erroneously asserted a use or release restriction with regard to technical data described in section 2320(a)(2)(A) of this title.”.

SEC. 825. EXTENSION OF SUNSET DATE FOR CERTAIN PROTESTS OF TASK AND DELIVERY ORDER CONTRACTS.

Paragraph (3) of section 2304c(e) of title 10, United States Code, is amended to read as follows:

“(3) Paragraph (1)(B) and paragraph (2) of this subsection shall not be in effect after September 30, 2016.”.

SEC. 826. INCLUSION OF OPTION AMOUNTS IN LIMITATIONS ON AUTHORITY OF THE DEPARTMENT OF DEFENSE TO CARRY OUT CERTAIN PROTOTYPE PROJECTS.

Section 845 of the National Defense Authorization Act for Fiscal Year 1994 (10 U.S.C. 2371 note) is amended—

(1) in subsection (a)(2)—

(A) in subparagraph (A), by inserting “(including all options)” after “not in excess of \$100,000,000”; and

(B) in subparagraph (B), by inserting “(including all options)” after “in excess of \$100,000,000”; and

(2) in subsection (e)(3)(A), by inserting “(including all options)” after “does not exceed \$50,000,000”.

The agreement includes a provision combining elements of the House and Senate provisions.

Subtitle C—Amendments to General Contracting Authorities, Procedures, and Limitations

Provisions relating to fire resistant fiber for production of military uniforms (sec. 821)

The House bill contained a provision (sec. 811) that would extend to 2021 the authority in section 829 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181) for the Department of Defense to procure fire resistant rayon fiber that is manufactured in a foreign country under certain circumstances.

The Senate committee-reported bill contained a provision (sec. 856) that would require a comprehensive study of the issue.

The agreement includes the House provision with an amendment that would extend the authority in section 829 for 2 years and require a comprehensive study of the issue.

Repeal of requirement for certain procurements from firms in the small arms production industrial base (sec. 822)

The House bill contained a provision (sec. 812) that would amend section 2473 of title 10, United States Code.

The Senate committee-reported bill contained a provision (sec. 817) that would repeal section 2473 of title 10, United States Code.

The agreement includes the Senate provision.

Review of regulatory definition relating to production of specialty metals (sec. 823)

The House bill contained a provision (sec. 813) that would define the term "produced" for the purposes of section 2533b of title 10, United States Code, relating to the production of specialty metals within the United States.

The Senate committee-reported bill contained no similar provision.

The agreement includes a provision that would require the Secretary of Defense to review and, if necessary, revise the definition of the term "produced" currently included in the regulations implementing section 2533b to ensure that the definition is consistent with the language of the statute and congressional intent in enacting the provision.

Guidance relating to rights in technical data (sec. 824)

The Senate committee-reported bill contained a provision (sec. 832) that would require the Secretary of Defense to revise guidance on rights in technical data to promote competition and ensure that the United States is not required to pay more than once for the same technical data.

The House bill contained no similar provision.

The agreement includes the provision with a clarifying amendment.

112TH CONGRESS }
1st Session }

SENATE

{ REPORT
112-26 }

**NATIONAL DEFENSE AUTHORIZATION
ACT FOR FISCAL YEAR 2012**

REPORT

[TO ACCOMPANY S. 1253]

ON

TO AUTHORIZE APPROPRIATIONS FOR FISCAL YEAR 2012 FOR
MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE AND
FOR MILITARY CONSTRUCTION, TO PRESCRIBE MILITARY PER-
SONNEL STRENGTHS FOR FISCAL YEAR 2012, AND FOR OTHER
PURPOSES

TOGETHER WITH

ADDITIONAL VIEWS

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE



JUNE 22, 2011.—Ordered to be printed

Subtitle C—Amendments Relating to General Contracting Authorities, Procedures, and Limitations

Treatment for technical data purposes of independent research and development and bid and proposal costs (sec. 841)

The committee recommends a provision that would clarify the treatment of independent research and development (IR&D) and bid and proposal (B&P) costs for the purposes of section 2320 of title 10, United States Code, governing rights in technical data. The provision recommended by the committee would ensure government-purpose rights (the right to use the data to ensure competition for future government purchases) in technical data for an item or process that is developed through the expenditure of IR&D and B&P costs in the case of: (1) an item or process for which the contractor contributed less than 10 percent of the cost of development; or (2) an item or process that is integrated into a major system and either: (a) cannot be segregated from the system as a whole; or (b) was developed predominantly at government expense.

Extension to all management employees of applicability of the senior executive benchmark compensation amount for purposes of allowable cost limitations under government contracts (sec. 842)

The committee recommends a provision that would amend section 2324 of title 10, United States Code, to extend the existing cap on allowable costs for defense contractor executive compensation to apply to all contractor management employees. Under current law, the cap applies only to the five most highly-compensated management employees in each segment of the company. The committee concludes that the extension of the provision is justified to ensure that the Department is not required to reimburse defense contractors for unreasonable or excessive compensation paid to company executives.

Covered contracts for purposes of requirements on contractor business systems (sec. 843)

The committee recommends a provision that would amend section 893 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383) to clarify which defense contracts are covered contracts for the purpose of the authority to withhold payments under section 893.

6) Compliance with defense procurement requirements for purposes of internal controls of non-defense agencies for procurements on behalf of the Department of Defense (sec. 844)

The committee recommends a provision that would clarify the standards that a non-defense agency would have to meet to be suitable for interagency contracting by the Department of Defense. The provision recommended by the committee would require a non-defense agency to certify that the agency is compliant with: (1) the Federal Acquisition Regulation and other laws and regulations that apply to the procurement of property and services by federal agen-

NATIONAL DEFENSE AUTHORIZATION ACT
FOR FISCAL YEAR 2012

CONFERENCE REPORT

TO ACCOMPANY

H.R. 1540



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United States Code, for the acquisition of right-hand drive passenger sedans is included on the list of dollar thresholds that are subject to adjustment for inflation in accordance with the requirements of section 1908 of title 41, United States Code, and is adjusted pursuant to such provision, as appropriate.

SEC. 815. RIGHTS IN TECHNICAL DATA AND VALIDATION OF PROPRIETARY DATA RESTRICTIONS.

(a) **RIGHTS IN TECHNICAL DATA.**—Section 2320 of title 10, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (2)(D)(i)—

(i) in subclause (I), by striking "or" at the end;

(ii) by redesignating subclause (II) as subclause

(III); and

(iii) by inserting after subclause (I) the following new subclause (II):

"(II) is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; or";

(B) in paragraph (2)(E), by striking "and shall be based" and all that follows through "such rights shall" and inserting ". The United States shall have government purpose rights in such technical data, except in any case in which the Secretary of Defense determines, on the basis of criteria established in such regulations, that negotiation of different rights in such technical data would be in the best interest of the United States. The establishment of any such negotiated rights shall"; and

(C) in paragraph (3), by striking "for the purposes of paragraph (2)(B), but shall be considered to be Federal funds for the purposes of paragraph (2)(A)" and inserting "for the purposes of the definitions under this paragraph"; and

(2) in subsection (b)—

(A) in paragraph (7), by striking "and" at the end;

(B) in paragraph (8), by striking the period and inserting a semicolon; and

(C) by adding at the end the following new paragraphs:

"(9) providing that, in addition to technical data that is already subject to a contract delivery requirement, the United States may require at any time the delivery of technical data that has been generated or utilized in the performance of a contract, and compensate the contractor only for reasonable costs incurred for having converted and delivered the data in the required form, upon a determination that—

"(A) the technical data is needed for the purpose of reprocurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial item or process; and

"(B) the technical data—

"(i) pertains to an item or process developed in whole or in part with Federal funds; or

"(ii) is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; and

"(10) providing that the United States is not foreclosed from requiring the delivery of the technical data by a failure to challenge, in accordance with the requirements of section 2321(d) of this title, the contractor's assertion of a use or release restriction on the technical data."

(b) **VALIDATION OF PROPRIETARY DATA RESTRICTIONS.**—Section 2321(d)(2) of such title is amended—

(1) in subparagraph (A)—

(A) in the matter preceding clause (i), by striking "Except as provided in subparagraph (C)" and all that follows through "three-year period" and inserting "A challenge to a use or release restriction asserted by the contractor in accordance with applicable regulations may not be made under paragraph (1) after the end of the six-year period";

(B) in clause (ii), by striking "or" at the end;

(C) in clause (iii) by striking the period and inserting "; or"; and

(D) by adding at the end the following new clause:

"(iv) are the subject of a fraudulently asserted use or release restriction.";

(2) in subparagraph (B), by striking "three-year period" each place it appears and inserting "six-year period"; and

(3) by striking subparagraph (C).

(c) **EFFECTIVE DATE.**—

(1) **IN GENERAL.**—Except as provided in paragraph (2), the amendments made by this section shall take effect on the date of the enactment of this Act.

(2) **EXCEPTION.**—The amendment made by subsection (a)(1)(C) shall take effect on January 7, 2011, immediately after the enactment of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383), to which such amendment relates.

SEC. 816. COVERED CONTRACTS FOR PURPOSES OF REQUIREMENTS ON CONTRACTOR BUSINESS SYSTEMS.

Paragraph (3) of section 893(f) of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383; 124 Stat. 4312; 10 U.S.C. 2302 note) is amended to read as follows:

"(3) The term 'covered contract' means a contract that is subject to the cost accounting standards promulgated pursuant to section 1502 of title 41, United States Code, that could be affected if the data produced by a contractor business system has a significant deficiency."

SEC. 817. COMPLIANCE WITH DEFENSE PROCUREMENT REQUIREMENTS FOR PURPOSES OF INTERNAL CONTROLS OF NON-DEFENSE AGENCIES FOR PROCUREMENTS ON BEHALF OF THE DEPARTMENT OF DEFENSE.

Section 801(d) of the National Defense Authorization Act for Fiscal Year 2008 (10 U.S.C. 2304 note) is amended by striking "with the requirements" and all that follows and inserting "with the following:

Annual report on single-award task and delivery order contracts (sec. 809)

The Senate amendment contained a provision (sec. 824) that would streamline reporting requirements for single-award task and delivery order contracts.

The House bill contained no similar provision.

The House recesses.

Subtitle B—Amendments to General Contracting Authorities, Procedures, and Limitations

Calculation of time period relating to report on critical changes in major automated information systems (sec. 811)

The House bill contained a provision (sec. 811) that would clarify the trigger for determining whether a major automated information system has achieved full deployment decision in a timely manner.

The Senate amendment contained no similar provision.

The Senate recesses with a technical amendment based on comments from the Department of Defense.

Change in deadline for submission of Selected Acquisition Reports from 60 to 45 days (sec. 812)

The House bill contained a provision (sec. 812) that would adjust the deadline for submission of Selected Acquisition Reports.

The Senate amendment contained no similar provision.

The Senate recesses.

Extension of sunset date for certain protests of task and delivery order contracts (sec. 813)

The House bill contained a provision (sec. 813) that would extend the sunset date for certain protests of task and delivery order contracts.

The Senate amendment contained no similar provision.

The Senate recesses.

Clarification of Department of Defense authority to purchase right-hand drive passenger sedan vehicles and adjustment of threshold for inflation (sec. 814)

The House bill contained a provision (sec. 814) that would clarify Department of Defense authority to purchase right-hand drive passenger sedans.

The Senate amendment contained a similar provision (sec. 884).

The House recesses with a technical amendment.

Rights in technical data and validation of proprietary data restrictions (sec. 815)

The Senate amendment contained a provision (sec. 841) that would clarify the treatment of independent research and development and bid and proposal costs for purposes of section 2320 of title 10, United States Code, governing rights in technical data.

The House bill contained no similar provision.

The House recedes with an amendment that would clarify the circumstances in which the United States has government-purpose rights in technical data and the extent to which the United States may require the delivery of technical data to which it already has rights, but the delivery of which was not required in the contract.

Covered contracts for purposes of requirements on contractor business systems (sec. 816)

The Senate amendment contained a provision (sec. 843) that would clarify what contracts are covered for the purposes of withholding funds under section 893 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383).

The House bill contained no similar provision.

The House recedes.

Compliance with defense procurement requirements for purposes of internal controls of non-defense agencies for procurements on behalf of the Department of Defense (sec. 817)

The Senate amendment contained a provision (sec. 844) that would amend section 801 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181) to clarify that when the Department of Defense makes purchases through non-defense agencies the other agencies are expected to comply with the requirements of the Federal Acquisition Regulation and other laws and regulations that apply to procurements by all federal agencies and with laws and regulations applicable to inter-agency transactions by the Department of Defense, but not with internal Department of Defense procurement rules.

The House bill contained no similar provision.

The House recedes.

Detection and avoidance of counterfeit electronic parts (sec. 818)

The Senate amendment contained a provision (sec. 848) that would strengthen the detection, avoidance, notification, and remediation of counterfeit and suspect counterfeit electronic parts in defense systems.

The House bill contained no similar provision.

The House recedes with a clarifying amendment.

The conferees note that the authority provided to the Secretary of the Treasury to share information under this provision should not be interpreted to suggest that any other government agency lacks the authority to share similar information with the owner of a copyright or registered mark.

Modification of certain requirements of the Weapon Systems Acquisition Reform Act of 2009 (sec. 819)

The House bill contained a provision (sec. 841) that would amend certain provisions of acquisition law to provide additional flexibility to the Department of Defense.

The Senate amendment contained a similar provision (sec. 802).

The House recedes.

114TH CONGRESS }
1st Session

SENATE

{ REPORT
114-49

**NATIONAL DEFENSE AUTHORIZATION
ACT FOR FISCAL YEAR 2016**

REPORT

[TO ACCOMPANY S. 1376]

ON

TO AUTHORIZE APPROPRIATIONS FOR FISCAL YEAR 2016 FOR
MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE AND
FOR MILITARY CONSTRUCTION, TO PRESCRIBE MILITARY PER-
SONNEL STRENGTHS FOR SUCH FISCAL YEAR, AND FOR OTHER
PURPOSES

TOGETHER WITH

ADDITIONAL VIEWS

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE



MAY 19, 2015.—Ordered to be printed

million but more than the current threshold of \$750,000, the Department of Defense (DOD) would be required to establish a risk-based contracting approach, under which certified cost or pricing data would be required for a risk-based sample of contracts, to ensure that DOD is getting fair and reasonable prices for such contracts.

The committee believes that a 100 percent review of certified cost or pricing data on thousands of small contracts is not the best use of DOD's limited acquisition and auditing resources, particularly for those contracts that have been awarded based on a technical competition. By enabling DOD to adopt a risk-based contracting approach, this provision should free up significant resources to be applied in areas where they are likely to achieve a better return. In addition, the provision will enable non-traditional contractors to participate in innovative DOD research projects valued at less than \$5.0 million without triggering government-unique contracting procedures, enhancing DOD's access to cutting-edge technologies developed by companies that might otherwise be unwilling to do business with the government.

Limitation of the use of reverse auctions and lowest priced technically acceptable contracting methods (sec. 824)

The committee recommends a provision that would: (1) Prohibit the use of reverse auctions and lowest priced technically acceptable (LPTA) contracting methods for the procurement of personal protective equipment where the level of quality needed or the failure of the item could result in combat casualties; and (2) establish a preference for best value contracting methods when procuring such equipment. The committee is concerned that an overarching bias towards reducing prices paid by the Department of Defense (DOD) to the exclusion of other factors could result in DOD buying low cost products that have the potential to negatively impact the safety of U.S. troops. This could be a particular problem with the quality of personal protective equipment such as helmets, body armor, eye protection, and other similar individual equipment issued to U.S. military personnel. While LPTA and reverse auction contracting techniques are appropriate for some type of purchases, the committee believes that lowest price is not always the best strategy when quality and innovation are needed. In these cases, the committee believes a best value acquisition approach is more appropriate.

Rights in technical data (sec. 825)

The committee recommends a provision that: (1) Would clarify procedures for the validation of rights in technical data for subsystems and components of major weapon systems; and (2) establish a government-industry advisory panel on rights in technical data.

The provision would amend section 2321 of title 10, United States Code, that establishes procedures for the validation of rights in technical data. Subsection (f) of this section, added by the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355), endeavored to protect intellectual property rights in commercial items by adding a presumption that commercial items are devel-

oped exclusively at private expense. Because almost all major weapon systems are developed at government expense, section 802 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364) added an exception to the presumption in subsection (f) in the case of items other than commercially available off-the-shelf (COTS) items that are included in major weapon systems.

The exception for major weapon systems in subsection 2321(f) has created two potential problem areas. First, although almost all major weapon systems are developed at government expense, a few major weapon systems and subsystems of major weapon systems are purchased as commercial items—for example, modified civilian aircraft that are purchased for military uses. Section 2321(f) requires the contractor to demonstrate that components of weapon systems were developed at private expense even in the case of commercial-derivative aircraft, commercial-derivative engines, and other weapon systems and subsystems that are purchased as commercial items.

Second, although subsection 2321(f) includes an exception for COTS items that are included in major weapon systems, this exception does not apply if the COTS item is modified in any way for government use. Consequently, if the government insists on a minor modification of a COTS item for the purpose of including it in a weapon system, the burden will fall on the contractor to demonstrate that the item was developed exclusively at private expense.

The provision recommended by the committee would address these problems by clarifying that the presumption that a commercial item was developed exclusively at private expense applies in the case of: (1) A component of a weapon system or subsystem that was acquired as a commercial item; and (2) any other component that is a COTS item or a COTS item with modifications of a type customarily available in the commercial market place or minor modifications made to meet government requirements.

Procurement of supplies for experimental purposes (sec. 826)

The committee recommends a provision that would update the experimental acquisition authority in section 2373 of title 10, United States Code, to apply to transportation, energy, medical, and space flight and to clarify when provisions of Chapter 137 of title 10 apply to such procurements. The committee believes that the authorities of section 2373 (in addition to other transaction authority in section 2371 and section 845 other transaction prototype authority) offer an alternative acquisition path for the Department of Defense to pursue technologies and solutions from non-traditional contractors to maintain technological superiority in the future.

NATIONAL DEFENSE AUTHORIZATION ACT
FOR FISCAL YEAR 2016

LEGISLATIVE TEXT
AND
JOINT EXPLANATORY STATEMENT

TO ACCOMPANY

S. 1356

PUBLIC LAW 114-92



NOVEMBER 2015

Printed for the use of the Committee on
Armed Services of the House of Representatives

Subtitle B—Amendments to General Contracting Authorities, Procedures, and Limitations

SEC. 811. AMENDMENT RELATING TO MULTIYEAR CONTRACT AUTHORITY FOR ACQUISITION OF PROPERTY.

Subsection (a)(1) and subsection (i)(4) of section 2306b of title 10, United States Code, are each amended by striking "substantial" and inserting "significant".

SEC. 812. APPLICABILITY OF COST AND PRICING DATA AND CERTIFICATION REQUIREMENTS.

Section 2306a(b)(1) of title 10, United States Code, is amended—
(1) in subparagraph (B), by striking "; or" and inserting a semicolon;

(2) in subparagraph (C), by striking the period at the end and inserting "; or"; and

(3) by adding at the end the following new subparagraph:

"(D) to the extent such data—

"(i) relates to an offset agreement in connection with a contract for the sale of a weapon system or defense-related item to a foreign country or foreign firm; and

"(ii) does not relate to a contract or subcontract under the offset agreement for work performed in such foreign country or by such foreign firm that is directly related to the weapon system or defense-related item being purchased under the contract."

SEC. 813. RIGHTS IN TECHNICAL DATA.

(a) RIGHTS IN TECHNICAL DATA RELATING TO MAJOR WEAPON SYSTEMS.—Paragraph (2) of section 2321(f) of title 10, United States Code, is amended to read as follows:

"(2) In the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor for a major system or a subsystem or component thereof on the basis that the major weapon system, subsystem, or component was developed exclusively at private expense—

"(A) the presumption in paragraph (1) shall apply—

"(i) with regard to a commercial subsystem or component of a major system, if the major system was acquired as a commercial item in accordance with section 2379(a) of this title;

"(ii) with regard to a component of a subsystem, if the subsystem was acquired as a commercial item in accordance with section 2379(b) of this title; and

"(iii) with regard to any other component, if the component is a commercially available off-the-shelf item or a commercially available off-the-shelf item with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet Federal Government requirements; and

"(B) in all other cases, the challenge to the use or release restriction shall be sustained unless information provided by the

contractor or subcontractor demonstrates that the item was developed exclusively at private expense.”.

(b) **GOVERNMENT-INDUSTRY ADVISORY PANEL.**—

(1) **ESTABLISHMENT.**—Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, Technology, and Logistics, shall establish a Government-industry advisory panel for the purpose of reviewing sections 2320 and 2321 of title 10, United States Code, regarding rights in technical data and the validation of proprietary data restrictions and the regulations implementing such sections, for the purpose of ensuring that such statutory and regulatory requirements are best structured to serve the interests of the taxpayers and the national defense.

(2) **MEMBERSHIP.**—The panel shall be chaired by an individual selected by the Under Secretary, and the Under Secretary shall ensure that—

(A) the government members of the advisory panel are knowledgeable about technical data issues and appropriately represent the three military departments, as well as the legal, acquisition, logistics, and research and development communities in the Department of Defense; and

(B) the private sector members of the advisory panel include independent experts and individuals appropriately representative of the diversity of interested parties, including large and small businesses, traditional and non-traditional government contractors, prime contractors and subcontractors, suppliers of hardware and software, and institutions of higher education.

(3) **SCOPE OF REVIEW.**—In conducting the review required by paragraph (1), the advisory panel shall give appropriate consideration to the following factors:

(A) Ensuring that the Department of Defense does not pay more than once for the same work.

(B) Ensuring that Department of Defense contractors are appropriately rewarded for their innovation and invention.

(C) Providing for cost-effective procurement, sustainment, modification, and upgrades to Department of Defense systems.

(D) Encouraging the private sector to invest in new products, technologies, and processes relevant to the missions of the Department of Defense.

(E) Ensuring that the Department of Defense has appropriate access to innovative products, technologies, and processes developed by the private sector for commercial use.

(4) **FINAL REPORT.**—Not later than September 30, 2016, the advisory panel shall submit its final report and recommendations to the Secretary of Defense. Not later than 60 days after receiving the report, the Secretary shall submit a copy of the report, together with any comments or recommendations, to the congressional defense committees.

are directly-related to the weapon systems of defense-related item being purchased under the contract.

Rights in technical data (sec. 813)

The Senate amendment contained a provision (sec. 825) that would clarify procedures for the validation of rights in technical data for subsystems and components of major weapon systems; and establish a government-industry advisory panel to review sections 2320 and 2321 of title 10, United States Code.

The House bill contained no similar provision.

The House recedes.

Procurement of supplies for experimental purposes (sec. 814)

The Senate amendment contained a provision (sec. 826) that would update the experimental acquisition authority in section 2373 of title 10, United States Code, to apply to transportation, energy, medical, and space flight and to clarify when provisions of Chapter 137 of title 10 apply to such procurements.

The House bill contained no similar provision.

The House recedes.

Amendments to other transaction authority (sec. 815)

The House bill contained a provision (sec. 853) would make permanent the other transactions authority (OTA) for contracting established in section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103-160), as modified most recently by section 812 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291). The provision would also make changes to the authority to use such mechanisms.

The Senate amendment contained a similar provision (section 804) that modified the authority, as well as modifying the definition of a "non-traditional" defense contractor.

The House recedes with an amendment that would: (1) make section 845 authority permanent; (2) clarify the authority to use section 845 authority to acquire prototypes or follow-on production items to be provided to contractors as government-furnished equipment; (3) ensure that innovative small business firms are authorized to participate in other transactions under section 845 without the requirement for a cost-share (except where the small business is partnered with a large business in a transaction); and (4) clarify the use of follow-on production contracts or other transactions authority. The provision further requires the Department of Defense to study the benefits of permitting not-for-profit entities to enter into other transactions agreements without the requirement for cost sharing.

We believe that the flexibility of the OTA authorities of section 2371 of title 10, United States Code, and the related and dependent authorities of section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103-160) as modified and codified in this provision, can make them attractive to firms and organizations that do not usually participate in government contracting due to the typical overhead burden and "one size fits all" rules. We believe that expanded use of OTAs will support Depart-